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No. 72

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939

UNITED STATES OF AMERICA.....*Petitioner,*

v.

MRS. JULIA CAROLINE SPONENBARGER, ET AL.....*Respondents.*

**CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT**

**BRIEF FOR RESPONDENT MRS. JULIA CAROLINE  
SPONENBARGER**

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No. 72

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1939

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UNITED STATES OF AMERICA.....*Petitioner,*

v.

MRS. JULIA CAROLINE SPONENBARGER, ET AL.

---

**CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT**

---

**BRIEF FOR RESPONDENT MRS. JULIA CAROLINE  
SPONENBARGER**

---

**STATEMENT OF THE CASE.**

This action was instituted by respondent Mrs. Julia Caroline Sponenbarger under the Tucker Act, 28 U. S. C. A., Sec. 41 (20), for compensation required by the Fifth Amendment for the taking of her property for public use. Respondent owns forty acres of cultivated land in Desha County, Arkansas, the fair-market value of which was reduced from \$5,000 to \$1,000 as the direct, proximate, and predetermined result of the establishment of the Boeuf

Floodway under authority of the Flood Control Act of May 15, 1928. 33 U. S. C. A., Sec. 702a, 702b-702d, 702e-702g, 702h-702j, 702k, 702l, 702m; Public No. 391, 70th Congress.

Respondent's 40 acres of land lies at the head or intake of said floodway, about one mile inland midway between the northern and southern extremities of the fuse plug levee hereinafter described (R. 395, 159, 160, 163, 167, 250).

The answer of petitioner denied (1) that the enactment of the Flood Control act created any express or implied obligation to compensate respondent, and that any act of the government done under authority of the statute constituted a taking of respondent's property; and (2) asserted that the Boeuf Floodway had by a subsequent act of Congress (June 15, 1936; 33 U. S. C. A., Secs. 702a-1 to 702a-10, Public No. 678—74th Congress) been abandoned and the Eudora floodway substituted in lieu thereof (R. 18, 77, 377).

The prime and fundamental issue in this action is purely one of law, viz: Do the established facts constitute a "taking" of respondent's property by the United States for use in a floodway as the result of the construction work done on the flood control project authorized by the Flood Control Act of May 15, 1928? Secondarily: If so, what "just compensation" shall be awarded under the provisions of the Fifth Constitutional Amendment?

The case cannot well be clearly stated more concisely than is done in respondent's original Petition filed August 11, 1934 (R. 4-16; R. 310, par. 40).

The full force of the issues to be decided will not be fully or fairly apprehended until each of respondent's de-

tailed requests for Findings of Fact and Conclusions of Law have been considered, tested by the record and applied (R. 298-350). The most vital and decisive of these requests are based on uncontradicted facts, refer to indisputable public records, or are self-evident to the mind replete with the record facts involved.

Judicial statements of the physical facts involved are found in the following opinions: *Kincaid v. United States*, 35 F. (2d) 235; *Kincaid v. United States*, 37 F. (2d) 602; *United States v. Kincaid*, 49 F. (2d) 768; *Hurley v. Kincaid* 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637; (R. 11-12; R. 310, par. 41).

This is a test case to settle the issue of law involved (R. 217-219). In each of the Court of Claims cases (R. 218-219), after exhaustive printed and oral arguments, the defendant's demurrers on the issue of legal liability have been repeatedly overruled. So also did the late District Judge Martineau in the lower court overrule the petitioner's demurrer in this case, ruling that the only question for trial was the amount of compensation; that is, the amount of respondent's damage, if any (R. 18, and appendix A this brief). Notwithstanding the overwhelming proof of every material allegation of respondent's Petition (R. 4-16), every material premise of fact being without substantial contradiction, after an extensive, expensive trial Judge Martineau was reversed by the final judgment of the District Court (R. 376-390). If the conclusions of District Judge Davis (R. 376-390) are correct petitioner's demurrer should have been sustained in this case, as well as in all the cases pending in the Court of Claims. He was properly reversed by the Circuit Court of Appeals. *Sponenbarger et al v. United States*, 101 F. (2d) 506.



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The disastrous flood of 1927 for the first time shocked the Nation and the Congress of the United States into recognition and *assumption of national responsibility* for the flood control of the Mississippi River (See Point V, B, 2). Following a trip of personal inspection of that national catastrophe, Secretary Herbert Hoover referred to it as "our greatest peace-time disaster." President Coolidge, in his message to Congress, declared: "Flood control is a *national problem*. Its recurrence *must* be forever prevented."

After prolonged and exhaustive hearings by the appropriate committees, the Congress by the passage of the Flood Control Act of May 15, 1928 (Public—No. 391—70th Congress), adopted, and enacted into law, "*the engineering plan* set forth and recommended," in House Document No. 90, 70th Congress, 1st session, commonly called the Jadwin Plan in honor of its author, the then Chief of Engineers, Major General Edgar Jadwin (R. 118-126). Many recommendations of economic policy, as, for instance, the requirement of local contribution to cost and damage (Doc. 90, paragraphs 147 and 25 to 42, inclusive), were expressly rejected by the Congress (Secs. 2 and 4 of Act of May 15, 1928). "The engineering plan" was adopted *in toto* (Sec. 1 of Act).

This *engineering plan* was, and is, *one*, single, entire indivisible, complete, comprehensive plan and project for the flood control of the entire alluvial valley of the Mississippi River extending from Cape Girardeau, Missouri, to the Head of Passes at the mouth of the river (Sec. 1 of the Act; Doc. 90, Secs. 1-2; R. 118-121). See Point II this brief.

Furthermore, after the Report of the special Board on August 8, 1928, as required by Section 1 of the Act (Com. Doc. No. 28, House of Representatives, 70th Congress, 2d Session; R. 127), and the action of the President thereon on August 13, 1928 (R. 128), this engineering plan became "the legal project to be executed in accordance with the law." As further stated by Attorney General Mitchell: "Nowhere in the act does it appear that any latitude whatever is permitted with respect to the project covered by the act, save and except as is provided for in connection with the recommendations of the special board and the decision of the President thereunder. As pointed out heretofore the board having acted and completed its duties and the President having made his decision upon such recommendation of such special board, and such decision having been acted upon to a greater or less extent by the officers in charge of the project, it would seem that the project covered by the act has now become *fixed and definite* with no power of modification or change, except as provided in the project itself, by any authority save the Congress. . . . *this project is fixed and not subject to review or change by this administration.*" (Com. Doc. No. 2, 71st Congress, 1st Session, July 19, 1929, "Opinion of the Attorney General," at pp. 15 and 16; R. 127-129; *Sponenbarger v. United States*, 101 F. (2d) 506 at p. 508). Therefore, Petitioner falls into fundamental error by urging that "the Jadwin Plan was only tentative and general in character—a mere outline of flood control in the alluvial valley of the Mississippi River" (Petition for Certiorari, p. 6). As a matter of fact, as well as law, after August 13, 1928, (R. 128) the Plan became both *definite and fixed*.

The Plan recognizes the engineering impossibility of building levees sufficiently high to carry within the main channel of the Mississippi River a flood of the proportions of the 1927 flood, to say nothing of possible floods 33-1/3% larger (R. 161-162). Therefore the plan of flood control by levees only, which had been advocated by the Mississippi River Commission since 1879 (Doc. 90, Secs. 80 and 3; R. 122 and 119), was definitely abandoned by the Congress. Instead, the present law provides for the confinement of floods as far as practicable within the main stem of the Mississippi River by a uniform system of levees only *to their safe carrying capacity*. These levees in flood times cannot possibly carry the enormous volumes of surface water which gather from the vast drainage basin of the Mississippi River shown at R. 391. No other river in the world is comparable to it. The basin includes all or portions of 31 States and about 20,000 square miles of Canada. This great Father of Waters and its tributaries drain an area of 1,240,000 square miles, or approximately 41% of the continental United States. It reaches from the Appalachian Mountains on the east to the Rocky Mountains on the west. Its extremities are respectively in western New York, western Montana, western Canada 70 miles north of the northern boundary of Montana, and southern Louisiana. The only rivers approaching this in length are the Nile and the Amazon, the estimated length of each being about 4,000 miles. The total length of the navigable waterway of the Mississippi River and its tributaries is estimated at 15,000 miles (Doc. 90, Secs. 43-50; Report of Mississippi River Commission, House Com. Doc. 1, 70th Congress, 1st Session, p. 4, Sec. 15).

The Flood Control Act of May 15, 1928, is designed to take care of a project flood of approximately 3,000,000 cubic second feet of water in the vicinity of Arkansas City (R. 162). In 1927 approximately 1,200,000 cubic feet per second came into the Mississippi River at the mouth of the Arkansas River, above Arkansas City, and the fuse plug levee. Approximately 2,000,000 cubic second feet came out of the Ohio River to the mouth of the Arkansas River in 1937 (R. 245). Levees below the mouth of the Arkansas River cannot be constructed high enough and strong enough to carry this enormous volume of approximately 3,000,000 cubic feet per second of water. "I can consent to nothing that increases substantially the flow of water below the fuse plug beyond 1,850,000 second-feet, because it courts disaster—we do not dare to permit this water to pass that fuse plug" (Chief of Engineers Markham in 1934, R. 141). Therefore when a flood of approximately 3,000,000 cubic second feet of water reaches the vicinity of the fuse plug levee, just below the mouth of the Arkansas River, since the levees below will not safely carry more than approximately 2,000,000 cubic second feet, "over a million feet has to go out of there whether anybody likes it or not."\*\*\* "I repeat that a million second-feet *must* be taken out of that river unless you are going to have more and more disaster.\*\*\* That is pretty nearly 6 times all the water that flows over Niagara Falls" (Chief of Engineers Markham, R. 140-141 and, in 1936, R. 145-146 and 143). This enormous excess of flood water "*must be spilled* through safety valves when the volume exceeds the safe capacity of the river" (Doc. 90, Sec. 97, R. 123). "To *insure* that excess water will leave the main river, a fuse plug section of the levee in the vicinity of Cypress



Creek must be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade. This relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below" (Doc. 90, Sec. 118, R. 124). To further insure this designed result, an inspection of the map of the Jadwin Plan as prepared by the Army Engineers, and as actually constructed, will disclose that just below the mouth of the Arkansas River the enormous volume of flood waters which come from the entire drainage basin of the Mississippi River with all of its tributaries (R. 391) is actually gathered together by levee-lines in such a way as to violently funnel the entire flood directly against the fuse plug levee. At the mouth of the Arkansas and White Rivers the levee lines of the Mississippi River are from 12 to 14 miles apart. The greatest width of the channel of the Mississippi River in the reach between Arkansas River and Red River is a point 14 miles below the mouth of the Arkansas River in the latitude of the fuse plug levee, above the bottle-neck (Vol. 1 "Mississippi River Flood Control and Navigation" published by the United States Waterways Experiment Station of the War Department, Corps of Engineers, U. S. Army, May 1, 1932, at p. 40). When the flood waters of the White and Arkansas Rivers have been poured into those of the Mississippi River beyond the safe capacity of the levees below to carry, the levee lines are rapidly constricted so as to form a "bottle-neck" about the middle of the fuse plug levee, in the vicinity of Arkansas City, approximately 1 mile wide. Not only so, but the levees on the East side of the Mississippi River will be seen to curve sharply and extend due West so as to throw the entire force of the flood

squarely against the weak fuse plug levee immediately North of Arkansas City, *insuring* the absolute destruction of respondent's property when the fuse plug levee functions as designed. See also R. 11 and 395. When respondent's suit was filed "the weakest point of the fuse plug levee, which would most likely crevasse under the stress of a flood, was in the vicinity of Cypress Point revetment, about 2 to 3 miles North of *the bottle-neck in the vicinity of Arkansas City*. A bottle-neck means where the levee lines are very close together constricting the floodway width of the river to an extreme amount as compared with the width above and below" (R. 158). "Any flood coming out of the White and Arkansas Rivers joining with that of the upper Mississippi that can safely pass through the constricted channel of the Mississippi River known as the bottle-neck near Arkansas City can be safely carried through the widened channel South of the bottle-neck and past the fuse plug levee. The fuse plug levee would crevasse, if at all, in the upper portion of the fuse plug levee before reaching the bottle-neck (R. 165).

Therefore, the fundamental difference, the vital key-stone and very heart of the Jadwin Plan, the present *law*, is to *artificially* and *certainly* protect the levee system, and most of the alluvial valley, by diverting all surplus water in excess of the safe carrying capacity of the main river through lateral *floodways* into auxiliary channels, the principal one in the critical mid-section of the river being the Boeuf Floodway (Doc. 90, Sec. 3, R. 119; Com. Doc. 1, 74th Congress, p. 21, par. 17, R. 144). This had never been done before.

The Boeuf Floodway may be considered as "a separate and independent project provided for by the 1928

insinuation that respondent's land was in a swamp, unreclaimed area. The ring-levee has not been constructed around Arkansas City to take it from the floor of the Boeuf Floodway, and its industries, commerce and schools have now been completely paralyzed by Federal law, including respondent's land (R. 187).

Petitioner erroneously states that "the land lies in the basin of the Boeuf River, which rises in the northern part of Desha County" (p. 3 of Petition for Certiorari). An examination of any of the accurate maps will show that the Boeuf River rises far to the South of respondent's land, rising in the northern part of Chicot County—not Desha. The northern part of Desha County naturally drained into the Mississippi River through Cypress Creek North of Arkansas City and South through Boggy Bayou into Chicot County. Only by an engineering northern extension of Boeuf Basin by the flood control works constructed under the 1928 Act has respondent's land been placed therein. Her property, therefore, is not now "a *natural* floodway" but rather an "*artificial* floodway" created by petitioner.

It is thus clear that respondent's land has never before been overflowed "by reason of *DIVERSIONS from the main channel of the Mississippi River*" (1928 Act, Sec. 4, R. 119), and all future floodings will be the result of an entirely different hazard, artificially and intentionally created by the United States, pouring over respondent's land an enormous volume of "additional destructive flood waters" in a manner and from a place never before experienced (R. 159, 163, 171, 177, 178).

This impresses upon respondent's land an easement, and a certain *public servitude* for the general welfare,



for which she must be compensated. A definite part of her "property" has been "taken."

The petitioner United States, speaking by its only constitutionally authorized voice, the Congress, realizing that *for the first time in the history of the nation* it was assuming its just national responsibility in the premises, expressly admitted its constitutional liability to the property owners of these floodways, and intended beyond question to make the compensation required by the Fifth Amendment which provides: "Nor shall private property be taken for public use, without just compensation." See Sec. 4 of 1928 Act (R. 119). See Point V, B, 2, this Brief.

Immediately preceding the passage of the Act, and at the moment when the Conference Report on the bill was being agreed to, the Congress was advised by Chairman Reid of the House Flood Control Committee that the passage of the act, with the express provisions of Section 4, would definitely create the right to maintain *such an action as respondent's present suit*, as is evidenced by the following excerpt from the Congressional Record:

"Mr. BOX. The gentleman provides additional damages done by reason of the increased flow, as I understand it. How will such damages be ascertained?"

"Mr. REID of Illinois. There is no method provided under the bill.

"Mr. BOX. *Will they have the right to proceed in court for the collection of such damages?*

"Mr. REID of Illinois: *This is the first time that any right has been recognized on the part of the individual owner against the Government for any flood-control damages.*

1. The construction of a series of experimental CUT-OFFS by petitioner, an idea which originated in 1932, some three years after respondent had sustained her loss (R. 265); and

2. Respondent's loss was a part of the general economic DEPRESSION which began in 1930; and

3. Respondent's loss was occasioned by the heavy TAX BURDEN on her land which existed at the time of, and prior to, her purchase of the land on January 20, 1927 (R. 179).

Each of these alleged defenses will be refuted under appropriate Points hereinafter argued.

The lower court based his conclusion that there was no "taking" on four erroneous premises, viz:

1. Because there was no "physical invasion" of respondent's land,

2. Because Boeuf Floodway "is not now, and never has been, in an operative condition."

3. Because Boeuf Floodway has been *abandoned* and

4. That respondent's loss of \$4,000 in market value is *consequential—damnum absque injuria* (R. 376-390; *Sponenbarger v. United States*, 21 F. Supp. 28).

The error of each of these premises which led the district court to a false conclusion will be hereinafter made manifest under the appropriate headings. Here let it suffice to point out:

(1) That the Act itself prohibits the payment of *damages* from physical invasion. Sec. 3 provides: "No liability

of any kind shall attach to or rest upon the United States for any *damage* from or by flood waters at any place." This is in conformity to the general rule of law existing when the act was passed. See *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041; *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363; *Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374; etc. The present action does *not* sound in tort for *damages* (R. 5). It is founded upon contract for a "*taking*" within the protection of the Fifth Amendment (R. 5; 28 U. S. C. A., Sec. 41 (20)).

(2) That the undisputed testimony even from petitioner's own witnesses is that the fuse plug spillway is, and for a long time has been, operative (R. 247, 248, 250). This is an indubitable, visible, physical FACT.

(3) That not only has the Boeuf Floodway *never* been *abandoned*; but Congress actually and expressly ratified its use for an indefinite period of time in the future by Sec. 2 of the Flood Control Act of June 15, 1936 (R. 154, 258). This was long after the filing of respondent's present action in 1934, and still longer after petitioner had "*taken*" respondent's property. This action must be adjudicated as of the time of the taking, and certainly not later than the date suit was filed, August 11, 1934 (R. 16).

There is *not yet any* assurance that the Boeuf Floodway will *ever* be abandoned (R. 154-155). Petitioner admits that: "There has been no preparation to carry out the construction authorized by the Overton Bill. . . . The Markham Plan (Eudora Floodway), authorized by the Overton Bill, so far is nothing but a paper plan, an optional plan. I cannot say whether it will ever be executed. Even the

"Mr. BOX. And does the gentleman believe we will have the right to proceed in court for the collection of such damage without the permission of Congress hereafter?

"Mr. REID of Illinois. I think it *creates a right*, and I presume every right in court follows the creation of that right." 69 Cong. Rec., Part 8, p. 8123.

Hence judicial decisions not involving the Flood Control Act of May 15, 1928, are inapposite. No authorities prior to May 15, 1928, can throw any real light on the legal issue of liability in this case, and may tend only to confuse the issue.

The "taking" of respondent's property was effected and completed by the following overt acts by the petitioner:

1. Passage of the Flood Control Act of May 15, 1928 (R. 118); followed by
2. The President's proclamation of August 13, 1928 (R. 128); followed by
3. The President's proclamation of January 10, 1929 (R. 128); followed by
4. Condemnation suit in Boeuf Floodway filed July 1, 1929 (R. 129); followed by
5. The issuance of an *Injunction* July 1, 1929, prohibiting "all persons," including respondent, from interfering in any way with the *full possession of the United States* (R. 129-130), which suit was not dismissed and which injunction was not dissolved until December 18, 1934, long after respondent had filed her present action (R. 130); and by
6. Petitioner assuming control of the fuse plug levee as a spillway essential to the Jadwin Plan, thereby depriv-

ing respondent of her inherent right to defend her property from the flood waters of the Mississippi River (Doc. 90, Sec. 120, R. 124; 1928 Act, Secs. 1 and 9, R. 118-119); and by

7. The actual construction work done by petitioner under authority of the 1928 Act making the fuse plug levee operative, and converting it into a spillway as it was designed to function by the Jadwin Plan. Work on the project began immediately after the passage of the Act (R. 244; see *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637), and the fuse plug levee has been potentially operative as a safety valve or relief levee (Doc. 90, Secs. 97, 134; R. 123) since approximately 1932 (R. Neptune 157-159, Wonson 167-168, Simons 175, Mathis 244, 246, 247, 249, 251).

By its *pleadings* petitioner offered as its defense pure conclusions and issues of *law*, to-wit:

1. Conclusion of counsel that the foregoing acts do not constitute a taking of respondent's property (R. 377)—a general denial (R. 18 and 77); and

2. That the Boeuf Floodway was abandoned by the passage of the Flood Control Act of June 15, 1936, (R. 79 and 377, refuted by R. 258), approximately two years after respondent had filed her present action; and

3. That any loss of market value sustained by respondent was *consequential damages* (*damnum absque injuria*) (R. 80).

The *testimony* offered by petitioner did not go squarely to the issue of liability, but was rather addressed to an issue not made by the pleadings, viz., *mitigation of damages* by



details of the plan have not yet been worked out much less approved by the higher authorities" (R. 258): *The Jadwin Plan as adopted by the Flood Control Act of 1928, has not yet been actually, physically changed.* There has been no appropriation for the mere authorization of the Overton Bill. The plan of the Overton Bill (Markham Plan of the Act of June 15, 1936), cannot, by its own terms, become effective until flowage rights have been acquired within a definite limit and that has not yet been done. *The only plan under actual construction is that authorized by the Flood Control Act of May 15, 1928.* That is the actual, physical plan which is on the ground" (R. 247).

The District Judge referred to the fact that the present action is not a condemnation suit (R. 386). This is wholly immaterial. "The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners *did not change the essential nature of the claim.*" *Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142, 143, 96 A. L. R. 1, at p. 3.

The entire record on the foregoing issues, when clearly and correctly apprehended, required a reversal of the District Court, which erred in refusing respondent's requested Finding of Fact No. 101 (R. 334) and Conclusions of Law Nos. 61-62 (R. 350) and 24 (R. 339). The findings of the Circuit Court of Appeals (*Sponenbarger et al v. United States*, 101 F. (2d) 506) are based on undisputable physical facts and unimpeachable public records. Its reasoning is sound and its conclusions inescapable. Its judgment, we respectfully submit, should be affirmed.

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## STATEMENT OF POINTS URGED

## POINT I.

**The Documentary Evidence introduced is competent and CONCLUSIVE.**

This Point covers Assignments of Error Nos. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 28, 30, 31, 32, 33, 35, 47, 82, 96, and 131 (R. 99-106).

Cases and statutes referred to in the argument, in the order cited, are:

*Title 33 U. S. C. A.*, secs. 641, 647, 648, 701, 702.

*United States v. Pfitsch*, 256 U. S. 547, 41 S. Ct. 569, 65 L. ed. 1084.

*Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240.

*Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226.

*Edwards v. Darby*, 12 Wheat. 206, 6 L. ed. 603.

*Boston Sand & Gravel Company v. United States*, 278 U. S. 41, 49 S. Ct. 52, 73 L. ed. 170.

*Duplex Printing Press Company v. Deering*, 254 U. S. 443, 41 S. Ct. 172, 65 L. ed. 349.

*United States v. Butler, etc. Hoosac Mills Corporation*, 297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 477.

*Wright v. Mountain Trust Bank*, 300 U. S. 440, 57 S. Ct. 556, 81 L. ed. 736.

*Savage v. United States*, 1 Ct. Cls. 170.

*Title 28 U. S. C. A.*, sec. 272.

*Arizona v. California*, 283 U. S. 423, 51 S. Ct. 522, 75 L. ed. 1154.

*Thornton v. United States*, 271 U. S. 414, 46 S. Ct. 585, 70 L. ed. 1013.

23 *Corpus Juris*, sec. 1901, p. 102.

*Tempel v. United States*, 248 U. S. 121, 39 S. Ct. 56, 63 L. ed. 162.

*The Apollon*, 9 Wheat. 362, 6 L. ed. 111.

ways may be either controlled or uncontrolled. In the latter type they become operative as soon as the main stream passes above its banks, and remain operative until flood stages have passed. In the former type, the head of the floodway is closed by a structure which prevents operation until the safe capacity of the main river flood channel has been exceeded. When this stage is reached, the floodway takes off the excess flood waters. The structure at the floodway head may be a fixed or moveable weir. In both types, flow down the floodway ceases as soon as the main river stages fall below weir crest elevation. The closing structure may, on the other hand, be *an earthen dike or levee designed to crevasse when dangerous flood stages are reached*. Such a dike is known as a *fuse plug*. After rupture of a fuse plug, flow down the floodway continues until flood stages cease on the main river. Objection is advanced to the fuse plug on the ground that a seasoned levee cannot always be relied upon to crevasse to such an extent and with sufficient rapidity to accommodate the entire excess flood discharge. This criticism springs from an *incomplete concept of proper fuse plug design*. The elevation of the fuse plug crest must be such that it will be overtopped *before the safe capacity of the river flood channel is exceeded*. *Overtopping is always followed by a crevasse which will lower main river stages at and above the fuse plug*. Should this crevasse be insufficient to accommodate the entire excess flow, rising main river stages will again overtop the fuse plug and the process will be repeated" (Vol. II Mississippi River Flood Control and Navigation by U. S. Army Engineers, War Department, Waterways Experiment Station, Vicksburg, Mississippi, May 1, 1932, at pp. 291-292).



This levee converted into a "fuse plug" by the 1928 Act was originally constructed by the local property owners and was completed by the Southeast Arkansas Levee District in 1921 to the then standard grade and section recommended by the Mississippi River Commission, giving the area behind it equal chances and protection with all other areas in the alluvial valley (R. 174, 184, 131-132). This levee has successfully withstood every flood since 1921, and when the 1928 Act was passed was successfully protecting respondent's land from all flood waters from the main channel of the Mississippi River (R. 161, 170, 174, 278). In 1927 the land was under water from crevasses in the *Arkansas River* levee 35 miles away (R. 163); but such inundations, rising slowly and without current, were not destructive. On the contrary such character of occasional flooding is by many considered beneficial (McGehee, R. 221; Farrell, R. 225). In fact, the entire alluvial valley was so built.

The historical fact which years ago created market values in this vicinity, constantly increasing till the passage of the Flood Control Act of May 15, 1928, and existing at the time of respondent's purchase of her property, was the *confident, assured, justified* expectation of speedy and ultimate complete protection against the floodwaters of the Mississippi River, equal to that enjoyed by any other protected area in the Middle Section of the river. For many years these property owners in the Boeuf Floodway had been taxing themselves, and issuing bonds secured by a lien against their property, for the purpose of building levees along the main stem of the Mississippi River and up the south bank of the Arkansas River to protect their property. This section of the levee now known as "the fuse plug" was

so built. It was completed by the closing of the last gap in the levee at Cypress Creek in 1921 (R. 184, 173-174), and has never since either been overtopped or crevassed. Respondent's property was finally absolutely safe against attack by floodwaters from the Mississippi River. The petitioner itself, speaking through its Chief of Engineers, *assured* the property owners that the closure of this gap *would give absolute flood protection in succeeding years* (R. 171).

Because of the steady progress of this program, prior periodic floodings of respondent's land had had no substantial effect on market values in that vicinity (R. 183, 184-185, 191, 196, 203, 221). On the contrary, for many years, as the work of levee building progressed, market values in this vicinity steadily increased. When it was finally assured that the levee line across the outlet of Cypress Creek into the Mississippi River would be built, this confident, assured, *justified* expectation of speedy and ultimate equal and complete flood protection was largely responsible for the high market values prevailing in the vicinity at the time of respondent's purchase of her land in 1927.

Respondent's property is now fully protected from any future flooding from the Arkansas River (R. 159, 168, 170, 147-148), the source from which the water last reached respondent's property in 1927—and ~~this independent~~ of the 1928 Act (Petition for Certiorari this case at p. 7; R. 362, par. 35). The River and Harbor Act of July 27, 1916, extended the jurisdiction of the Mississippi River Commission for a distance of about 92 miles up the Arkansas River to the Lincoln-Jefferson County line. This extension of jurisdiction was to permit certain necessary levee construction to enable the Commission to raise levee grades to the limit

of the effect of Mississippi backwater upon these levee lines. The extension of the main river levee line had so raised the main river flood plane that the backwater effects were gradually extended farther and farther up the tributaries (Vol. I Mississippi Flood Control and Navigation by U. S. Army Engineers, War Department, Waterways Experiment Station, Vicksburg, Mississippi, May 1, 1932, at p. 18).

Therefore, as the result of the persistent efforts by the individual property owners in this area for a generation, and at enormous expense resulting in heavy, bonded indebtedness against their lands, respondent's land would NOW enjoy *complete* flood protection but for the Flood Control Act of May 15, 1928.

Petitioner stresses the fact that respondent's land has been repeatedly overflowed by deep high water in the past, as in the years 1912, 1913, 1919, 1921, 1922, and 1927, urging that all property in this vicinity lies in the natural high-water bed of the river and was always subject to the servitude of flooding (Petition for Certiorari at pp. 3 and 9). The inference sought is entirely unjustified by the physical facts. This particular vicinity has been highly developed both agriculturally, industrially and commercially for many years (R. 183). Respondent's land lies on the outskirts of Arkansas City, the county seat of Desha County, which was a thriving business and industrial center in the days when Mark Twain piloted palatial passenger steamboats on the Mississippi River. The court house for all this county remains at Arkansas City. The importance of the community is recognized in the Jadwin Plan itself by the provision that a ring-levee shall be constructed around Arkansas City (Doc. 90, Sec. 118, R. 124). This refutes the

Act" (Petition for Certiorari, p. 8), in the same sense that the lungs are separate and independent organs of the human body. The Jadwin Plan would be as complete without the Boeuf Floodway as would an automobile without a carburetor. The *floodways* are as essential parts of the Jadwin Plan as are the vital organs of the human body essential to life. Without the *floodways*, and especially the Boeuf Floodway in the critical mid-section of the river, there would be no Jadwin Plan. Until the fuse plug levee began to function as a spillway the comprehensive Jadwin Plan was ineffective. As stated by the Circuit Court of Appeals, "this comprehensive plan binds together the lands on both sides of the river as parts of the same section of the alluvial valley." *Sponenbarger v. United States*, 101 F. (2d) 506, at p. 512.

When the case was tried below the actual construction of the plan had been substantially completed (R. 142-143, 147-148, 167), and was approximately 80% complete when appellant filed her case in 1934, the fuse plug levee at the entrance of the Boeuf Floodway having then been in an operative condition, ready to function as designed by law, for several years (R. 157, 167, 170-171, 175-178, 246, 249, 258).

Thus since approximately 1932 respondent has actually lived in the bed of this artificial floodway, designed to carry 1,000,000 cubic second-feet of water when necessary (R. 145), nearly six times all the water that flows over Niagara Falls, and five times all the water that flows down the St. Lawrence River to the sea (R. 146), protected only by the fuse plug levee at the head of the Boeuf Floodway (R. 395). This enormous volume of water would flow over respondent's land from 20 to 25 feet deep (R. 160-161,

177, 397), with destructive velocity causing unpredictable disaster (R. 162, 169, 177). In another flood like that of 1927 the volume of water diverted down the Boeuf Floodway would be *more than double* that which heretofore at any time naturally flowed in this area (R. 165). Never before in history has respondent's land been subjected to inundation or overflow by floodwater artificially diverted from the main channel of the Mississippi River.

Now, as a matter of law: "to insure that excess water will leave the main River, a fuse plug section of the levee in the vicinity of Cypress Creek MUST be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade. This *relatively weak section* will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below" (Doc. 90, Sec. 118, R. 124). "The levees generally will be (now HAVE BEEN) raised about 3 feet, so that the selected weaker, relief levees (the fuse plug levee), will be at about the elevation of the present levee top and *will surely serve their purpose*," (Doc. 90, Sec. 98, R. 123). "The United States MUST have control over the Cypress Creek (fuse plug) levee and *keep it substantially* at its present strength and present height" (Doc. 90, Sec. 120, R. 124). This fuse plug levee, which serves as an artificial escape-valve (Doc. 90, Sec. 97, R. 123), in comparison with the levees which have been constructed by the petitioner above and below, and on the opposite side of the river, is accurately and graphically illustrated by unquestioned exhibits at R. 393 and 395.

"*Fuse plug*" defined. "Floodways are not, in themselves, a method of complete flood control. They are normally constructed as an adjunct to a levee system. Flood-



*Scranton v. Wheeler*, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126.

*Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96.

*Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668.

*United States v. Chandler-Dunbar W. P. Co.*, 229 U. S. 53, 33 S. Ct. 667, 57 L. ed. 1063.

*Title 33 U. S. C. A.*, sec. 702c.

*Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449.

*Hurley v. Kinkaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

## POINT XI.

**The Law and Facts in the record which fix respondent's "Just Compensation."**

This Point covers Assignments of Error Nos. 105, 122, 123, 124, 125, 126, 127, 128, 129, 130, 133, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 157, 160, 166, and 167 (R. 104-108).

Cases and statutes referred to in the argument, in the order cited, are:

*Olson v. United States* (*Brewster v. United States*), 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236 (affirming C. C. A. 8th, 67 Fed. (2d) 24, 106 A. L. R. 961).

*United States v. Chicago, Burlington & Quincy Railroad Company*, (C. C. A. 8th) 82 Fed. (2d) 131, 106 A. L. R. 942, certiorari denied 298 U. S. 689, 56 S. Ct 957, 80 L. ed. 1408; Annotation 106 A. L. R. 955.

*Flood Control Act* of May 15, 1928.

*Title 28 U. S. C. A.*, sec. 41 (20).

*Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142.

*United States v. Great Falls Manufacturing Company*, 112 U. S. 645, 5 S. Ct. 306, 28 L. ed. 846.

*Roberts v. Northern Pacific Railroad Company*, 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.



*Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287.

*Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

*Great Falls Mfg. Co. v. Garland, Atty. Genl.*, 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527.

*United States v. Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539.

20. *Corpus Juris*, p. 530, sec. 18.

*Orgel on Valuation under Eminent Domain*, p. 444, Note 50; p. 4, sec. 1.

*Constitution, Fifth Amendment.*

*Orgel on Valuation under Eminent Domain*, p. 18, p. 146, p. 822, p. 836.

*Constitution of the State of Arkansas of 1874*, Art. II, Sec. 22.

*Little Rock & Fort Smith Ry. Co. v. Greer*, 77 Ark. 387, 96 S. W. 129.

*Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707.

*Brown v. Morison*, 5 Ark. 217.

*Roberts v. Williams*, 15 Ark. 43.

*Memphis etc. Ry. Co. v. Organ*, 67 Ark. 84, 55 S. W. 952.

*Cairo etc. Ry. Co. v. Turner*, 31 Ark. 494.

*Ex parte Martin*, 13 Ark. 198.

*Louisiana etc. Ry. Co. v. State*, 85 Ark. 12, 106 S. W. 960.

*State v. St. Louis, etc. Ry. Company*, 85 Ark. 422, 108 S. W. 508.

*United States v. New River Collieries Company*, 262 U. S. 341, 43 S. Ct. 565, 67 L. ed. 1014.

*Monongahela Navigation Company v. United States*, 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463.

*Cooley's Constitutional Limitations*, (7th ed.) p. 818.

*Lewis on Eminent Domain*, (3d ed.) sec. 712, sec. 830.

*East Peoria Sanit. Dist. v. Toledo P. & W. Rd. Co.*, 353 Ill. 296, 187 N. E. 512, 89 A. L. R. 870.

*Annotation*, 89 A. L. R. 879-887.

*Jacksonville & S. R. Co. v. Kidder*, 21 Ill. 131.

*Spann v. City of Dallas*, 111 Tex. 350, '235 S. W. 513,  
19 A. L. R. 1387.

*Buchanan v. Warley*, 245 U. S. 60, 38 S. Ct. 16, 62 L.  
ed. 149.

*Eaton v. Boston C. & M. R. R. Co.*, 51 N. H. 504, 12 Am.  
Rep. 147.

*Transcontinental Oil Co. v. Emmerson*, 298 Ill. 394,  
131 N. E. 645, 16 A. L. R. 507.

*Shedd v. Patterson*, 312 Ill. 371, 144 N. E. 5.

*Tatum Bros., etc., Co. v. Watson*, 92 Fla. 278, 289, 109  
So. 623.

*C. B. & Q. R. Co. v. Public Utilities Com.*, 69 Col. 275,  
193 Pac. 726.

*In re: Crook*, 219 Fed. 979.

*Watson v. Wolf*, 162 Pa. 153, 29 Atl. 646.

*Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

*Holst v. Savannah Elec. Co.*, 131 Fed. 931.

*State v. Kreutzberg*, 114 Wis. 530, 90 N. W. 1098.

*Pennsylvania R. R. Co. v. Angel*, 41 N. J. E. 316, 7  
Atl. 432.

*Smith v. Campbell*, 10 N. C. 590.

*Cleveland, etc., R. R. v. Backus*, 154 U. S. 439.

*Branson v. Bush*, 251 U. S. 182.

*Block v. Hirsch*, 256 U. S. 135.

*Pennsylvania Company v. Mahon*, 260 U. S. 393, 414,  
43 S. Ct. 158, 67 L. ed. 322.

*Ann. Cas.* 1918A, 1201.

*Ambler Realty Co. v. Village of Euclid*, 207 Fed. 321.

*Omnia Commercial Co., Inc. v. United States*, 261 U.  
S. 502, 43 S. Ct. 437, 67 L. ed. 773.

*Monongahela Navigation Co. v. United States*, 148 U.  
S. 312, 13 S. Ct. 622, 37 L. ed. 463.

*United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527,  
54 L. ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas.  
680.

*Drainage Commissioners v. Knox*, 237 Ill. 148, 86 N.  
E. 636.

*Pumpelly v. Green Bay & Miss. River Canal Co.*, 13  
Wall. 166, 20 L. ed. 557.

*Lewis, Eminent Domain* (3d ed.), sec. 68.

*Sanguinetti v. United States*, 264 U. S. 146, 44 S. Ct. 264, 68 L. ed. 608.

*Horstmann Co. v. United States*, 257 U. S. 138, 42 S. Ct. 58, 66 L. ed. 171.

*Gibson v. United States*, 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996.

*Great Falls Mfg. Co. v. Garland, Attorney General*, 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527.

*Jacobs v. United States*, 45 Fed. (2d) 34, (C. C. A. 5th).

*Miss. & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206.

*United States v. Williams*, 188 U. S. 485, 23 S. Ct. 363, 47 L. ed. 554.

*Manigault v. Springs*, 199 U. S. 473, 26 S. Ct. 127, 50 L. ed. 274.

*United States v. Sewell*, 217 U. S. 601, 30 S. Ct. 691, 54 L. ed. 897.

*United States v. Grizzard*, 219 U. S. 180, 31 S. Ct. 162, 55 L. ed. 165.

*Curtin v. Benson*, 222 U. S. 78, 32 S. Ct. 31, 56 L. ed. 102.

*Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. ed. 570.

*Richards v. Washington Terminal Co.*, 233 U. S. 546, 34 S. Ct. 654, 58 L. ed. 1088.

*United States v. North American Transp. & Trading Co.*, 253 U. S. 330, 40 S. Ct. 518, 64 L. ed. 935.

*Duckett & Co. v. United States*, 266 U. S. 149, 45 S. Ct. 38, 69 L. ed. 216.

*Campbell v. United States*, 266 U. S. 368, 45 S. Ct. 115, 69 L. ed. 328.

*Hersch v. United States*, 15 Ct. Cls. 385.

*Merriam v. United States*, 29 Ct. Cls. 250.

*Wayne County, Ky. v. United States*, 53 Ct. Cls. 417; aff'd., 252 U. S. 574, 40 S. Ct. 394, 64 L. ed. 723.

*Chappel v. United States*, 34 Fed. 673.

*In re: Delafield*, 109 Fed. 577.

*United States v. Chicago, B. & Q. R. Co.*, (C. C. A. 8th) 82 Fed. (2d) 131, 106 A. L. R. 942.

*United States v. Wabasha-Nelson Bridge Co.*, (C. C. A. 7th) 83 Fed. (2d) 852.

*Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S. E. 105, L. R. A. 1915C 981.

*Bruch v. Carter*, 32 N. J. L. 554.

*Fitzhugh v. City of Jackson*, 132 Miss. 585, 97 So. 190, 33 A. L. R. 279.

*Lovett v. West Virginia Central Gas Co.*, 65 W. Va. 739, 65 S. E. 196, 24 L. R. A. (N. S.) 230.

*Traut v. White*, 46 N. J. E. 437, 19 Atl. 196.

*Myer v. Adam*, 71 N. Y. S. 707.

*Wateree Power Co. v. Rion*, (S. C.), 102 S. E. 331.

*Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543.

*St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226.

*School Corporation v. Heiney*, 178 Ind. 1, 98 N. E. 628, 43 L. R. A. (N. S.) 1023.

*Glover v. Powell*, 10 N. J. E. 211.

*In re: Jacobs*, 98 N. Y. 98.

*Old Colony etc. R. Co. v. County*, 14 Gray 155.

*Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 545.

*Stockdale v. Rio Grande W. R. Co.*, 28 Utah 201, 77 Pac. 849.

*People ex rel. M. W. Advertising Co. v. Murphy*, 113 N. Y. S. 855.

*Webster County v. Lutz*, 234 Ky. 618, 28 S. W. (2d) 966.

*Martin et al., ex parte*, 13 Ark. 198.

*Lewis, Eminent Domain*, (3d ed.) secs. 889, 71, 74, 75, 78, 85, 88, 112.

20 *Corpus Juris*, p. 684, sec. 147.

*Tempel v. United States*, 248 U. S. 121, 39 S. Ct. 56, 63 L. ed. 162.

*In re: Mayor*, 58 N. Y. S. 58.

*Louisville & N. R. Co. v. Lambert*, 33 Ky. L. R. 199, 110 S. W. 305.

*Ft. Wayne & S. W. T. Co. v. Fort Wayne & W. R. Co.*, 83 N. E. 665, 16 L. R. A. (N. S.) 537.

*Hampden, etc., Co. v. Springfield, etc., R. Co.*, 124 Mass. 118.

*In re: Department of Public Parks*, 6 N. Y. S. 750.

*People ex rel. Canavan v. Collis, Commissioner of Public Works*, 46 N. Y. S. 727.

*Chelton Trust Co. v. Blankenburg*, (Pa.) 88 Atl. 664.

*In re: Philadelphia Parkway*, (Pa.) 95 Atl. 429.

*Cooley's Const. Lim.*, (7th ed.), p. 818.

*McFadden v. Johnson*, 72 Pa. 336, 13 Am. Rep. 681.

*Wood on Railroads*, vol. 2, p. 994.

*Lexington & O. R. Co. v. Ormsby*, 7 Dana. 277.

*Harlow v. Marquette, H. & O. R. Co.*, 41 Mich. 366.

*Cairo & F. R. Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 554.

*Pettibone v. La Crosse & M. R. Co.*, 14 Wis. 443.

*Chicago & A. R. Co. v. Goodwin*, 111 Ill. 282, 53 Am. Rep. 622.

*Roberts v. N. P. R. R. Co.*, 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.

*Mullen Benevolent Corporation v. United States*, 290 U. S. 89, 54 S. Ct. 38, 78 L. ed. 192.

*Mullen Benevolent Corporation v. United States*, 63 Fed. (2d) 48.

*Title 33 U. S. C. A.*, secs. 702a-10.

*Arkansas Highway Commission v. Kincannon*, 193 Ark. 450, 100 S. W. (2d) 969.

*City of Big Rapids v. Big Rapids F. M. Co.*, (Mich.) 177 N. W. 284.

*People v. Murphy*, 113 N. Y. S. 855.

*Kansas City Ordinance*, (Mo.) 252 S. W. 404.

*Prairie Pipe Line Co. v. Shipp*, 305 Mo. 663, 267 S. W. 647.

20 *Corpus Juris*, pp. 666-668, sec. 138.

*Lewis, Eminent Domain*, p. 66.

*Christman v. United States*, (C. C. A.) 74 Fed. (2d) 112.

*Hill v. United States*, 149 U. S. 593, 13 S. Ct. 1011, 37 L. ed. 862.

*Hot Springs R. R. Co. v. Williamson*, 45 Ark. 429, affirmed, 136 U. S. 121, 10 S. Ct. 955, 34 L. ed. 355.



## POINT VI.

**The Boeuf Spillway has not been abandoned.**

This Point covers Assignments of Error Nos. 141, 155, 156, 157, 173, 177, 202, 222, and 223 (R. 106-111).

Cases and statutes referred to in the argument are:

*Flood Control Act* of June 15, 1936.

*Flood Control Act* of May 15, 1928.

*Olson v. United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236.

*Heard v. Farmers Bank of Hardy*, 174 Ark. 194, 295 S. W. 38.

## POINT VII.

**The testimony anent CUT-OFFS is irrelevant, incompetent and immaterial. This testimony does not touch the issue of liability.**

This Point covers Assignments of Error Nos. 89, 141, 155, 158, 159, 195, 224, 225, 226, and 227 (R. 104-112).

Cases and statutes referred to in the argument are:

*Flood Control Act* of May 15, 1928.

## POINT VIII.

**The testimony anent the economic Depression and Tax Burden is irrelevant, incompetent and immaterial. This testimony is remote from respondent's loss, and without evidential value under the particular facts of this case.**

This Point covers Assignments of Error Nos. 71, 72, 182 and 186 (R. 103-109).

Cases and statutes referred to in the argument are:

*Flood Control Act* of May 15, 1928.

## POINT IX.

The Findings of Fact, requested by respondent (R. 298-334), are justified, and supported in the record, by (1) official Public Documents, (2) Uncontradicted Testimony, and (3) proved indubitably.

This Point covers Assignments of Error Nos. 5 to 105, inclusive, (R. 99-104).

Cases and statutes referred to in the argument are:

*Title 33 U. S. C. A.*, secs. 641, 647, 648, 701, 702.

*Flood Control Act* of May 15, 1928.

*Flood Control Act* of June 15, 1936.

## POINT X.

This Point distinguishes decisions relied on by petitioner.

No particular Assignments of Error are involved.

Cases and statutes referred to in the argument, in the order cited, are:

*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041.

*Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363.

*Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374.

*Sanguinetti v. United States*, 264 U. S. 146, 44 S. Ct. 264, 68 L. ed. 608.

*Horstmahn Co. v. United States*, 257 U. S. 138, 42 S. Ct. 58, 66 L. ed. 171.

*Bedford v. United States*, 192 U. S. 217, 24 S. Ct. 238, 48 L. ed. 414.

*Gibson v. United States*, 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996.

*Flood Control Act* of May 15, 1928.

*Jacobs v. United States*, (5th Circuit) 45 Fed. (2d)

- Cleveland etc. R. Co. v. Hadley*, (Ind.), 101 N. E. 473,  
45 L. R. A. (N. S.) 796.
- Lewis on Eminent Domain*, (3d ed.) secs. 713, 818, 825,  
845, and 846.
- United States v. Creek Nation*, 295 U. S. 103, 55 S. Ct.  
681, 79 L. ed. 1331.
- Orgel on Valuation under Eminent Domain*, sec. 5.
- Seaboard Airline Ry. Co. v. United States*, 261 U. S.  
299, 43 S. Ct. 354, 67 L. ed. 664.
- Phelps v. United States*, 274 U. S. 341, 47 S. Ct. 611,  
71 L. ed. 1083.
- Brooks-Scanlon Corporation v. United States*, 265 U.  
S. 106, 44 S. Ct. 471, 68 L. ed. 934.
- United States v. Cress*, 243 U. S. 316, 37 S. Ct. 380, 61  
L. ed. 746.
- 10 *Ruling Case Law*, p. 129, sec. 112; p. 134, sec. 117.
- Emmons v. Utilities Power Company*, (N. H.) 141  
Atl. 65, 58 A. L. R. 788.
- Alabama Power Company v. Carden*, 189 Ala. 384, 66  
So. 596.
- Seattle Mattress & Upholstery Co. v. Seattle*, 134 Wash.  
476, 236 Pac. 84.
- Schuylkill Nav. Company v. Thoburn*, 7 Serg. & R.  
(Pa.) 411.
- 9 *Ruling Case Law*, pp. 735-736, secs. 2-3.
- Eaton v. Boston C. & M. Rd. Company*, 51 N. H. 504,  
12 Am. Rep. 147.
- Orgel on Valuation under Eminent Domain*, sec. 19,  
sec. 80, sec. 106.
- Little Rock Junction Ry. v. Woodruff*, 49 Ark. 381,  
5 S. W. 792.
- Orgel on Valuation under Eminent Domain*, secs. 236,  
14, 20, 23 and 25.
- United States v. Inlets*, 26 Fed. Cas. 490, aff'd in *Kohl*  
*v. United States*, 91 U. S. 367, 23 L. ed. 449.
- National City Bank v. United States*, 275 Fed. 855,  
aff'd 281 Fed. 754.
- C. G. Blake Company v. United States*, 275 Fed. 861,  
aff'd 279 Fed. 71.

- Tilden v. United States*, (D. C. La., 1934) 10 F. Supp. 377.
- United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 33 S. Ct. 667, 57 L. ed. 1063.
- Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 30 S. Ct. 459, 54 L. ed. 725.
- 1 Nichols, *Eminent Domain*, 663, 671.
- 2 Lewis, *Eminent Domain*, sec. 706, sec. 707.
- Omnia Commercial Company v. United States*, 261 U. S. 502, 43 S. Ct. 437, 67 L. ed. 773.
- Matter of City of New York (Inwood Hill Park)*, 230 App. Div. 41, 243 N. Y. S. 63.
- Clark's Ferry Bridge Co. v. Public Service Commission*, 291 U. S. 227, 54 S. Ct. 427, 78 L. ed. 767.
- New York v. Sage*, 239 U. S. 57, 36 S. Ct. 25, 60 L. ed. 143.
- Mississippi & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206.
- Wetmore v. Rymer*, 169 U. S. 115, 18 S. Ct. 293, 42 L. ed. 682.
- Conneas v. Commonwealth*, 184 Mass. 541, 69 N. E. 34.
- Southern Ry. Co. v. Memphis*, (Tenn.) 148 S. W. 662, 41 L. R. A. (N. S.) 828.
- Muscoda Bridge Co. v. Grant County*, 200 Wis. 185, 227 N. W. 863.
- Raleigh v. Mecklinburg Mfg. Co.*, (N. C.) 85 S. E. 300, L. R. A. 1916A, 1090.
- Central Georgia Power Co. v. Mays*, 137 Ga. 120, 72 S. E. 900.
- In re: New York etc. Co. v. Blacker*, 178 Mass. 386, 59 N. E. 1020.
- McCandless v. United States*, 298 U. S. 342, 56 S. Ct. 764, 80 L. ed. 1205.
- Idaho & W. R. Co. v. Columbia Conference*, 20 Idaho 568, 119 Pac. 60, 38 L. R. A. (N. S.) 497.
- Act of June 30, 1906*, 34 Stat. 764, Title 31 U. S. C. A., Sec. 627.
- Revised Statutes*, sec. 3733, Title 41 U. S. C. A., sec. 12.

*Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363.

*Heath v. Wallace*, 138 U. S. 573, 11 S. Ct. 380, 34 L. ed. 1063.

*Jones v. United States*, 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691.

*Hoyt v. Russell*, 117 U. S. 401, 6 S. Ct. 881, 29 L. ed. 914.

*Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 S. Ct. 757, 43 L. ed. 49.

*Nicol v. Ames*, 173 U. S. 509, 19 S. Ct. 522, 43 L. ed. 786.

10 *Ruling Case Law*, p. 1100, sec. 303; and page 861, sec. 3.

*Muller v. Oregon*, 208 U. S. 412, 28 S. Ct. 324, 52 L. ed. 551.

*Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187.

*Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200.

*Sparrow v. Strong*, 3 Wall. 98, 18 L. ed. 49.

*Re: Boyer, ex parte*, 109 U. S. 629, 3 S. Ct. 434, 27 L. ed. 1056.

*Heard v. Farmers' Bank*, 174 Ark. 194, 295 S. W. 38.

1 *Jones Commentaries on Evidence* (2d ed.), secs. 440-444, 447-449.

*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041.

*Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, at p. 1194, notes 20 and 21.

*United States v. Bekins*, 304 U. S. 27, 58 S. Ct. 811, 82 L. ed. 1137, at pp. 1142, 1143, notes 1, 2 and 3.

*United States v. Klamath and Moadoc Tribes*, 304 U. S. 119, 58 S. Ct. 799, 82 L. ed. 1219, at p. 1224, note 14.

*National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 57 S. Ct. 615, 108 A. L. R. 1352, 81 L. ed. 893.

Title 28 U. S. C. A., sec. 41 (20).

*Judicial Code*, sec. 164.

36 *Stat.* 1140.



## POINT II.

The Jadwin Plan, enacted into law by the Flood Control Act of May 15, 1928, is one, single, comprehensive project, of which the Boeuf Floodway is an essential and vital feature. When work began on any part of this entire project it affected property in the Boeuf Floodway.

This Point covers Assignments of Error Nos. 40, 169, 172, 174, 201, and 203 (R. 101-110).

Cases and statutes referred to in the argument are:

*Flood Control Act* of May 15, 1928.

*Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

*United States v. Hess*, 70 Fed. (2d) 142, 71 Fed. (2d) 78.

## POINT III.

The Boeuf Spillway is in operative condition, certain to function as designed. The proposed guide levees, which have not been built, are unnecessary and immaterial to respondent's cause of action.

This Point covers Assignments of Error Nos. 26, 27, 28, 29, 30, 31, 32, 33, 36, 43, 48, 52, 233, 234, 235, 236, 237, and 238 (R. 100-113).

Cases and statutes referred to in the argument are:

*Flood Control Act* of May 15, 1928.

## POINT IV.

The Boeuf Floodway is an artificial diversion for which the United States is solely responsible. Absolute Federal control over the fuse plug levee authorized by the Flood Control Act of May 15, 1928, creates the Boeuf Floodway.

This Point covers Assignments of Error Nos. 34, 35, 37, 38, 41, 42, 43, 67, 161, 231, and 232 (R. 101-112).

Cases and statutes referred to in the argument are:

*Flood Control Act* of May 15, 1928.

*Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041.

*Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363.

*Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374.

*Title 33 U. S. C. A.*, sec. 702i, sec. 408, sec. 701, sec. 702, sec. 411.

30 *Stat.* 1152.

39 *Stat.* 950.

42 *Stat.* 1505.

*Houck v. United States*, 201 Fed. 862, 120 C. C. A. 200.

*Cape Girardeau & T. B. T. R. Co. v. Jordan*, 201 Fed. 868, 120 C. C. A. 206.

*Scranton v. Wheeler*, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126.

*United States v. Chandler-Dunbar W. P. Co.*, 229 U. S. 53, 33 S. Ct. 667, 57 L. ed. 1063.

*Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96.

*Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668.

*River and Harbor Act* of March 3, 1899, secs. 13, 14, 16 and 17.

## POINT V.

The established physical facts prove a "TAKING" of respondent's private "property" for public use. Actual physical invasion of her land is irrelevant. No consequential damages are involved.

This Point covers Assignments of Error Nos. 1, 2, 3, 4, 21, 22, 23, 24, 25, 44, 46, 70, 71, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 132, 134, 135, 136, 137, 138, 188, 192, 193, 194, 199, 208, 209, 229, 230, and 239 (R. 99-113).

Cases and statutes referred to in the argument, in the order cited, are:

Constitution, *Fifth Amendment*.

*Flood Control Act* of May 15, 1928.

*Flood Control Act* of June 15, 1936.

*United States v. Hess*, (C. C. A. 8th) 70 Fed. (2d) 142.

*United States v. Hess*, (C. C. A. 8th) 71 Fed. (2d) 78.

*United States v. Yazoo & M. V. Ry. Co.*, 4 Fed. Supp. 366.

*United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 55 S. Ct. 306, 28 L. ed. 846.

*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041.

*Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363.

*Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374.

*Bedford v. United States*, 192 U. S. 217, 48 L. ed. 414.

*Kincaid v. United States*, 35 Fed. (2d) 235, 37 Fed. (2d) 602, and 49 Fed. (2d) 768.

*Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

*Title 28 U. S. C. A.*, sec. 71.

*United States v. Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539.

*United States v. Cress*, 243 U. S. 316, 37 S. Ct. 380, 61 L. ed. 746.

*Peabody v. United States*, 231 U. S. 530, 34 S. Ct. 159, 58 L. ed. 351.

*Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U. S. 1, 39 S. Ct. 399, 63 L. ed. 809; 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287.

*Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142, 96 A. L. R. 1.

50 *Corpus Juris*, p. 729, sec. 2.

22 *Ruling Case Law*, pp. 37-39, secs. 2 and 3.

50 *Corpus Juris*, p. 745, sec. 17.

Lewis, *Eminent Domain* (3d ed.), secs. 63, 64, and 65, pp. 51-58.

alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with *the engineering plan* set forth and recommended, \* \* \* in House Document numbered 90" (Sec. 1, R. 118). It consistently refers to "*the project*," "*this project*" (Secs. 1, 4 and 5), "*the adopted project*," "*the project herein adopted*," "*such project*," "*that part of the project on the east side of the river*" (Sec. 1), "*any item of the project*" (Sec. 3), "*the flood-control plan herein adopted*" (Sec. 4), "*the project herein authorized*" (Sec. 8).

Document 90 submits "*the following project for the flood control of the Mississippi River in its alluvial valley*" (Sec. 1); and consistently describes the entire project in the singular. "*The plan is a comprehensive one*" (Sec. 2, R. 119), which is repeatedly referred to as "*it*" (Sec. 2). Note: "*the recommended plan*" (Sec. 3, R. 119; Sec. 139, R. 125); "*the plan*" (Sec. 129, R. 125; Sec. 8, R. 120); "*the plan recommended*" (Sec. 23, R. 120); "*the project*" (Sec. 138, R. 125; Sec. 29, R. 120); "*the comprehensive plan*" (Sec. 38, R. 121); "*the plan is \* \* \* comprehensive, and provides for the disposal of all water predicted as possible*" (Sec. 99, R. 123); "*the comprehensive project recommended*" (Sec. 129, R. 125); "*the warning cannot be too strongly emphasized that unless the flood-discharge capacity provided in the plan herein recommended is preserved, a future great flood will result in a disaster*" (Sec. 140, R. 125); "*a comprehensive project \* \* \* as set forth in this document*" (Sec. 147, R. 126).

"*This project is fixed and not subject to review or change by this administration*" (Attorney General Mitchell, July 19, 1929, R. 129).

Of this "*one, unified, comprehensive project* for the flood control of the alluvial valley of the Mississippi River" (Mathes, R. 244), the middle section is the most critical part of the entire project (Doc. 1, p. 21, Sec. 17, R. 144). In this crucial middle section "the fuse plug relief levee at existing levee heights provides the best solution of the spillway problem. \* \* \* *the adopted project provides a sound engineering plan*" (Doc. 28, R. 127).

The Act (Jadwin Plan) involves the use of four floodways, each essential to the plan as a whole, each included as a part of the one, comprehensive plan (Doc. 90, Sec. 2), viz: (1) the relatively small by-pass or floodway from Birds Point to New Madrid for the protection of Cairo, Illinois, (2) the relatively small but important diversion at Bonnet Carre for the protection of New Orleans, (3) the Atchafalaya relief floodways for the lower Mississippi in southern Louisiana, and (4) the Boeuf Floodway for the relief of the critical middle section just below the mouth of the Arkansas River, for the protection of the balance of the alluvial valley (Doc. 90; sec. 121, R. 124).

These floodways are the distinctive *essential features* of the Jadwin Plan, and are so treated *together* throughout House Document 90. There is no justifiable distinction between either of the floodways so far as Government liability for their creation is concerned. Without these floodways there would be no Jadwin Plan. The Flood Control Act of May 15, 1928, is founded on these floodways. "The recommended plan fundamentally differs from the present project (prior to May 15, 1928) in that it *limits* the amount of flood water carried in the main river to its safe capacity and *sends* the surplus water through lateral *floodways*. Its *essential features* and their



clusive weight and decisive character. The District Court erred in refusing to adopt respondent's requested Conclusion of Law No. 26 (R. 339), and erred in acting upon petitioner's requested Conclusion of Law No. 24 (R. 375).

The Court is justified in accepting and acting upon reports of Congressional Committees, and explanations given on the floor of the Senate and House by those in charge of an Act of Congress, the legislative history of the Bill, and the testimony of official heads of Department given in Hearings before Congressional Committees on the Bill.

Every excerpt from each public document which respondent offered in evidence is not only competent as evidence but is from an official document of which this Court will take judicial notice. See:

*United States v. Pfitsch*, 256 U. S. 547, 41 S. Ct. 569, 65 L. ed. 1084, at p. 1086.

*Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240, at pp. 242, 243.

*Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226, 229, 230.

*Edwards v. Darby*, 12 Wheat. 206, 6 L. ed. 603, at pp. 604-605.

*Boston Sand & Gravel Company v. United States*, 278 U. S. 41, 49 S. Ct. 52, 73 L. ed. 170, 177.

*Duplex Printing Press Company v. Deering*, 254 U. S. 443, 475, 41 S. Ct. 172, 65 L. ed. 349, at p. 360.

*United States v. Butler, etc., Hoosac Mills Corporation*, 297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 477, at p. 497, and footnote p. 491.

*Wright v. Mountain Trust Bank*, 300 U. S. 440, 57 S. Ct. 556, 81 L. ed. 736, pp. 741, 742, 744, 745, footnotes 4, 8 and 9.

"Official letters of public officers have always been received as legal testimony."

*Savage v. United States*, 1 Court of Claims 170.

*Title 28 U. S. C. A.*, Sec. 272, p. 108, Footnote 5.

*Arizona v. California*, 283 U. S. 423, 51 S. Ct. 522, 75

L. ed. 1154, at p. 1165, footnotes.

*Thornton v. United States*, 271 U. S. 414, 46 S. Ct. 585,

70 L. ed. 1013, 1017.

23 *Corpus Juris*, Sec. 1901, p. 102, and numerous cases in footnotes.

*Tempel v. United States*, 248 U. S. 121, 39 S. Ct. 56,

63 L. ed. 162, footnotes pp. 163, 164.

“The court will take judicial notice of matters of general notoriety that may be gathered from the public documents of the government.”

*The Apollon*, 9 Wheat. 362, 6 L. ed. 111, at p. 114.

*Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011,

57 L. ed. 1363, at p. 1372, 1373.

*Heath v. Wallace*, 138 U. S. 573, 11 S. Ct. 380, 34 L.

ed. 1063, at p. 1068.

*Jones v. United States*, 137 U. S. 202, 11 S. Ct. 80, 34

L. ed. 691, at p. 697.

*Hoyt v. Russell*, 117 U. S. 401, 6 S. Ct. 881, 29 L. ed.

914.

*Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 S. Ct.

757, 43 L. ed. 49, 52.

*Nicol v. Ames*, 173 U. S. 509, 19 S. Ct. 522, 43 L. ed.

786, 792.

10 *Ruling Case Law*, p. 1100, sec. 303; and p. 861,

sec. 3.

“The court may not shut its eyes to any facts of common knowledge.”

*Muller v. Oregon*, 208 U. S. 412, 28 S. Ct. 324, 52 L.

ed. 551, 555-556.

*Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187, at p.

188.

*Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200, 201, 202.

*Sparrow v. Strong*, 3 Wall. 98, 18 L. ed. 49, 50.

*Re: Boyer, ex parte*, 109 U. S. 629, 3 S. Ct. 434, 27 L.

ed. 1056, at p. 1057.

*Heard v. Farmers' Bank*, 174 Ark. 194, at p. 206, 295

S. W. 38.

1 Jones *Commentaries on Evidence*, (2nd Ed.) Secs. 440-444, 447, 449.

"The court will take judicial notice of the dangerous floods to which the Mississippi River is occasionally subject."

*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041.

This Court is more and more frequently basing its decisions on information found in public hearings before the appropriate congressional committees, and citing these authoritative hearings in its opinions. See *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, at p. 1194, notes 20 and 21; *United States v. Bekins*, 304 U. S. 27, 58 S. Ct. 811, 82 L. ed. 1137, at pp. 1142; 1143, notes 1, 2, and 3; *United States v. Klamath and Moadac Tribes*, 304 U. S. 119, 58 S. Ct. 799, 82 L. ed. 1219, at p. 1224, note 14.

In announcing its decision in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 57 S. Ct. 615, 108 A. L. R. 1352, 81 L. ed. 893, at p. 914, the Court said: "We are asked to shut our eyes to the plainest facts of our national life and to deal with the question . . . in an intellectual vacuum." This the Court declined to do.

"Judge Cooley once said that 'Courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon'."

*Heard v. Farmers' Bank of Hardy*, 174 Ark. 194, at p. 206, 295 S. W. 38.

In the exercise of jurisdiction in this case under the Tucker Act (Title 28, U. S. C. A., p. 35, Sec. 41 (20)) the

court sits as a Court of Claims. Hence there is no jury. In the exercise of this jurisdiction:

"The said court shall have power to call upon any of the departments for *any information or papers* it may deem necessary, and shall have the use of *all recorded and printed reports made by the committees of each House of Congress*, when deemed necessary in the prosecution of its business." *Judicial Code*, Sec. 164; 36 Stat. 1140; *Title 28 U. S. C. A.*, Sec. 272, p. 107.

*Collier v. United States*, 173 U. S. 79, 19 S. Ct. 330, 43 L. ed. 621, at pp. 622-623.

Unquestionably the Circuit Court of Appeals must be sustained on this Point.

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## POINT II.

**ONLY ONE Flood Control PROJECT** was adopted by the Flood Control Act of May 15, 1928, of which the Boeuf Floodway is a vital and essential feature.

The District Court erred in treating the Boeuf Floodway as "a separate and independent project," "separate and apart as a distinct entity"; and in holding that work done "upon the adopted project at other places other than the western section of the middle division cannot be construed as the commencement of work upon said western section of the said middle division, to-wit: the Boeuf Floodway." The District Court erred in adopting petitioner's requested Findings of Fact Nos. 4 (R. 352) and 25 (R. 358), and in declaring petitioner's requested Conclusions of Law Nos. 10 (R. 371) and 12 (R. 371-372).

No one thoroughly familiar with the legislative history involved, and keenly alive to the specific language of the Act and House Document numbered 90 which describes "the engineering plan" adopted and authorized to be prosecuted, can fall into such fundamental error.

When the Supreme Court in *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637, declared that "a taking" was complete, giving rise to a cause of action, "as soon as work on THE PROJECT is begun," or "as soon as the Government begins to carry out THE PROJECT AUTHORIZED," the Court referred to work on any part of the Jadwin Plan which, *as a whole*, is designed to gather all the flood waters of the Mississippi River Basin (R. 391) lying above the junction of the Ohio and Mississippi Rivers, and carry these floods within the levees of the main stem of the Mississippi River to the extent of levee capacity.



but then to deliberately and artificially spill out of the main channel of the river, by selected diversions, all flood waters in excess of the safe carrying capacity of the levees below. By this Jadwin Plan, the present law, all of the enormous surface water of the Mississippi River Basin above the mouth of the Arkansas River, extending from Canada on the north, the Rocky Mountains on the west, and the Appalachian Mountains on the east, well-nigh inconceivable in its volume, is gathered by the levee system into a narrow funnel and hurled against a weak, fuse plug relief levee designed as an escape valve, immediately behind which lies respondent's property. See map of the plan attached to Doc. 90, 70th Congress, 1st Session, and R. 395.

The national aspect and unity of this single project is strikingly visualized at R. 391 (the sketch of the entire Mississippi River drainage basin); was explicitly recognized throughout all of the congressional debates on the Bill; and is manifested by the express language describing both the purpose and result of the adopted project. See Doc. 90, Sec. 23 (R. 120), and Doc. 90, Secs. 39-53 (R. 121).

Nowhere in either the Act, or in House Document No. 90, is a plural adjective ever used in referring to the adopted project, or suggesting the adoption of a combination of several independent projects. Every reference is to *one*, single, definite, comprehensive engineering plan intended to include the entire alluvial valley of the Mississippi River from its delta or mouth at the Head of Passes to the northern termination of the alluvial valley at Cape Girardeau, Missouri. Every descriptive adjective applied to this *one*, whole, entire plan is always *singular* and definite.

The Act adopts and authorizes the execution of *the* project for the flood control of the Mississippi River in its

Request No. 6 (R. 300) is proved by Doc. 90, Sec. 96, R. 122-123.

Request No. 7 (R. 300) is proved by Doc. 1, Sec. 17, R. 144.

Request No. 8 (R. 300) is proved by Doc. 90, Sec. 16, R. 120.

Request No. 9 (R. 301) is proved by Doc. 1, Sec. 7, R. 143-144.

Request No. 10 (R. 302) is proved by Doc. 90, Sec. 117, R. 123.

Request No. 11 (R. 302) is proved by Doc. 90, Sec. 118, R. 124.

Request No. 12 (R. 303) is proved by Doc. 90, Sec. 119, R. 124.

Request No. 13 (R. 303) is proved by Doc. 90, Sec. 120, R. 124.

Request No. 14 (R. 303) is proved by Doc. 90, Sec. 121, R. 124.

Request No. 15 (R. 303) is proved by Doc. 90, Sec. 134, p. 31.

Request No. 16 (R. 303) is proved by Doc. 90, Sec. 149, R. 126.

Request No. 17 (R. 304) is proved by Doc. No. 28, R. 127.

Request No. 18 (R. 304) is proved by Doc. No. 2, R. 127-128.

Request No. 19 (R. 304) is proved by Doc. No. 2, p. 12, R. 128.

Request No. 20 (R. 305) is proved by Doc. No. 2, pp. 13-16, R. 127-129.

Request No. 21 (R. 305) is proved by official, judicial records, R. 129-130.

Request No. 24 (R. 306) is proved by Doc. 90, Sec. 118, R. 124; and Doc. 798, pp. 26, 47, 54, R. 138-139.

Request No. 26 (R. 306) is proved by Doc. 798, p. 26, Sec. 17 and p. 29, Sec. 22 (f), R. 138. See also Wonson, R. 169, undisputed.

Request No. 27 (R. 306) is proved by Doc. 798, p. 44, Sec. 8, R. 139.

Request No. 28 (R. 306) is proved by official Hearings January 27, 1936, p. 43, R. 146; and R. 250.

Request No. 29 (R. 307) is proved by official Hearings February 27, 1934, pp. 24-25, R. 140-141.

Request No. 31 (Tr. 307) is proved by Title 33 U. S. C. A., Secs. 641, 647, 648, 701, 702, R. 132-134.

Request No. 43 (R. 311) is proved by Congressional Committee Reports and congressional debates.

Request No. 78 (R. 326) is proved by Doc. 90, Secs. 69-71, R. 248.

Request No. 92 (R. 331) is proved by Doc. 90, Secs. 8, 23, and 121, R. 120 and R. 124.

The public documents referred to were authenticated by stipulation of counsel (R. 298), and there is no question of their genuineness.

The District Court admitted these documents in evidence when offered (R. 118 and 126-127); but at the conclusion of respondent's testimony sustained petitioner's motion to strike the documents from the record as evidence (R. 287). Hence the competency of this evidence is vitally important.

Recent decisions not only dispel all possible doubt as to the competency of this evidence, but emphasize its con-

*Old Colony R. Co. v. Miller*, 125 Mass.<sup>n</sup> 1, 28 Am. Rep. 194.

*In re: Board of Water Supply*, 109 N. Y. State 1036.  
20 *Corpus Juris*, p. 997, sec. 394, p. 763, sec. 225.

*Lockhart Power Co. v. Askew*, 110 S. C. 449, 96 S. E. 685.

*Missouri R. & L. Co. v. Creed*, (Mo.) 32 S. W. (2d) 783 from 30 S. W. (2d) 605.

*Doty v. Johnson*, 84 Vt. 15, 77 Atl. 866.

*Hetzel v. Baltimore, etc., R. Company*, 169 U. S. 26, 18 S. Ct. 255, 42 L. ed. 648.

*Mullen Benevolent Corp. v. United States*, 63 Fed. (2d) 48.

*Controlling Human Behavior* by Daniel Starch, Hazel M. Stanton and Wilhelmine Koerth.

*Kansas City Southern Ry. Co. v. Boles*, 88 Ark. 533, 115 S. W. 375.

*Little Rock & Fort Smith Ry. v. McGehee*, 41 Ark. 207.

*Indiana, etc., Co. v. Pennsylvania R. Co.*, 229 Pa. 484, 78 Atl. 1039.

*Snyder v. The Western Union Rd. Co.*, 25 Wis. 60.

*Voigt v. Milwaukee*, 158 Wis. 666, 149 N. W. 392.

*Brainerd v. State*, 131 N. Y. S. 221.

*Fitzhugh v. Chesapeake, etc., R. Co.*, (Va.) 59 S. E. 415, 17 L. R. A. (N. S.) 124.

*St. Louis, etc., R. Co. v. Mendoza*, 193 Mo. 518, 91 S. W. 65.

*Evans v. Iowa Southern Utilities Co.*, (Ia.), 218 N. W. 66.

*Louisville & N. R. Company v. Lambert*, 33 Ky. L. R. 199, 110 S. W. 305.

*Stertz v. Stewart*, 74 Wis. 160, 42 N. W. 214.

*Montana Ry. Company v. Warren*, 137 U. S. 348, 11 S. Ct. 96, 34 L. ed. 681.

*Lewis, Eminent Domain*, sec. 655.

4 *Wigmore, Evidence*, sec. 1942.

*Lawson, Expert and Opinion Evidence*, 491.

*Orgel, Valuation under Eminent Domain*, sec. 130, sec. 132, sec. 133.

*Chicago etc. R. Rd. Co. v. Heidenreich*, 254 Ill. 231,  
98 N. E. 567, Ann. Cas. 1913C, 266,  
*Orgel, Valuation under Eminent Domain*, secs. 137, 146,  
153.  
*Springfield & Memphis Ry. v. Rhea*, 44 Ark. 258.  
*St. Louis etc. Ry. Co. v. Magness*, 93 Ark. 46, 123 S. W.  
786.

## POINT XII.

Respondent Mrs. Julia Caroline Sponenbarger is the sole proper party plaintiff. Other parties plaintiff were improperly made parties by the Court.

This Point covers Assignments of Error Nos. 162, 163, 164, 165, 215, 216, 217, 218, 219, and 220 (R. 107-111).

Cases and statutes referred to in the argument are:

Constitution, *Fifth Amendment*.

*Boston Chamber of Commerce v. City of Boston*, 217  
U. S. 189, 30 S. Ct. 459, 54 L. ed. 725.

20 *Corpus Juris*, 1187, and 653, and 1178, and 1185,  
and 847, 1188.

47 *Corpus Juris*, 56.

*Chicago B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 31  
S. Ct. 460, 55 L. ed. 521.

*A. W. Duckett & Company v. United States*, 266 U. S.  
149, 45 S. Ct. 38, 69 L. ed. 216.

*United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54  
L. ed. 787.

*Wayne County, Ky. v. United States*, 43 Court of  
Claims 417, aff'd., 252 U. S. 574, 40 S. Ct. 394,  
64 L. ed. 723.

*Clark v. United States*, 67 Ct. Cls. 337.

*Chiesa & Co. v. City of Des Moines*, 158 Iowa 343, 198  
N. W. 922.

*McGowan v. Milford*, 104 Conn. 452, 133 Atl. 570.

*Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267.

*Storms v. Manhattan Ry. Company*, 79 N. Y. S. 60.



*Hill v. Glendon etc. Mining Company*, 113 N. C. 259,  
18 S. E. 171.

*Reading R. Company v. Boyer*, 13 Pa. St. 496.

*Colcough v. Nashville etc. R. Company*, 2 Head (Tenn.)  
171.

*Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

*Parks v. City of Boston*, 15 Pick. 198.

*Jordan v. City of Benwood*, 42 W. Va. 312, 26 S. E.  
266.

*Cayce Land Co. v. Southern Ry. Company*, 111 S. C.  
115, 96 S. E. 725.

*Ranforth v. City of New York*, 183 N. Y. S. 629, aff'd,  
183 N. Y. S. 956.

*Turner v. R. R. Company*, 130 Mo. App. 535, 109 S. W.  
101.

*Peabody v. United States*, 231 U. S. 530, 34 S. Ct. 159,  
58 L. ed. 351.

*Whitecotton v. St. Louis etc. R. Co.*, 104 Mo. A. 65,  
78 S. W. 318.

*Mayor, etc., of Baltimore v. Latrobe*, 101 Md. 621, 61  
Atl. 203, 4 Ann. Cas. 1005.

*United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54  
L. ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas.  
680.

*Orgel, Valuation under Eminent Domain*, p. 374, pp.  
382, 383 and 392.

*Kindred v. Union Pacific Rd. Company*, 225 U. S. 582,  
32 S. Ct. 780, 56 L. ed. 1216.

*Roberts v. Northern Pacific Rd. Company*, 158 U. S.  
1, 15 S. Ct. 756, 39 L. ed. 873.

2 Lewis, *Eminent Domain* (3d ed.), p. 936, sec. 517; and  
cases therein cited; and p. 937, sec. 517.

*Louisville & N. R. Company v. Lambert*, 33 Ky. L. R.  
199, 110 S. W. 305.

*Federal Trust Company v. East Hartford Fire Dist.*  
283 Fed. 95.

*Knoll v. New York, etc. R. Company*, 121 Pa. 467, 15  
Atl. 571, 1 L. R. A. 366.

## ARGUMENT.

### POINT I.

#### DOCUMENTARY EVIDENCE, Competency and Weight.

The District Court erred in refusing to receive official, public documents as evidence conclusively establishing respondent's cause of action.

The best, and in fact conclusive, evidence of the taking of respondent's property as alleged in her Complaint (R. 4-16) is found in the official documentary evidence filed in proof (R. 118-156).

Actually each of respondent's requested Findings of Fact essential to the establishment of her cause of action, and determinative of petitioner's liability here, is irrefutably verified and settled by an official public document. These official documents were each intended for the information of Congress, and were published only after exhaustive research and careful deliberation. The Congress has relied upon these official public documents, and has based the national policy thereon.

Specifically, the absolute proof of each of respondent's requests for Findings of Fact, rejected by the district court, is found in the record as follows:

Request No. 3 (R. 299) is proved by the *Act*. (R. 118).

Request No. 4 (R. 299) is proved by judicial knowledge of national flood control legislation and the congressional debates and committee reports. See Neptune, R. 157.

Request No. 5 (R. 300) is proved by Doc. 90, Sec. 3, R. 119.

in Boeuf Floodway called for in the flood control plan of May 15, 1928, have not been constructed. They are *in no way essential to the functioning of the plan* so as to protect all of the alluvial valley of the Mississippi River except that portion actually in the floodway, as designed. *The fuse plug levee is now in a condition to function* whenever any flood occurs that reaches the point where the fuse plug levee is intended to function, viz., a gage of 60.5 on the Arkansas City gage. *This has been true for approximately five years*" (Simons, R. 178).

There can be no question as to the *certainty of the operation* of Boeuf Floodway when the predetermined stage of flood waters is reached on the Arkansas City gage.

"A floodway for excess floods is *provided* down the Boeuf River, on the west side of the river. \* \* \* The entrance to the floodway is closed by a *safety plug* section of the levee, at present grade, which is located at Cypress Creek near the mouth of the Arkansas. To *insure* their safety until this section opens, the levees of the Mississippi, from the Arkansas to the Red, will be raised about 3 feet. To *prevent* flood waters from entering the Tensas Basin, *except through the floodway* during high floods, the levees on the south side of the Arkansas will be strengthened and raised about 3 feet as far upstream as necessary" (Doc. 90, Sec. 16, R. 120). This had all been done when respondent filed her suit.

After reciting that the present top of the fuse plug levee is at a gage of only 60.5, and that it has been estimated that floods might come which would produce, if confined, stages of over 74 feet, the engineering plan, now enacted into law, continues: "It is obvious that no attempt should

be made to raise levees to such a height. The practical remedy is to raise the levee grade 3 feet on both sides of the Mississippi below the Arkansas River, to strengthen these levees so that they will not fail from causes other than accident or overtopping, and to preclude overtopping by *insuring* that the water in excess of the capacity of the leveed channel *be spilled out* near the mouth of the Arkansas" (Doc. 90, Sec. 117, R. 123). "The practical means to meet this situation is to spill the water out of the main leveed channel at *selected* points when the stages reach the danger point" (Doc. 90, Sec. 96, R. 123). "The excess *must be spilled* through safety valves when the volume exceeds the safe capacity of the river" (Doc. 90, Sec. 97, R. 123).

"To insure that excess water will leave the main river, a *fuse plug* section of the levee in the vicinity of Cypress Creek *must be kept* at its present strength and at its present grade, viz., 3 feet below the new levee grade. This relatively weak section will be long enough to discharge the *greatest predicted possible excess water* over and above the capacity of the leveed river below" (Doc. 90, Sec. 118, R. 124.) "A flood of a magnitude somewhere between that of 1922 and 1927 *will break it*, turning the excess water down the floodway, which will carry it safely to the backwater area at the mouth of the Red River" (Doc. 90, Sec. 17, R. 120).

"The levees generally will be raised about 3 feet, so that the selected, weaker relief levees will be at about the elevation of the present levee top and will SURELY serve their purpose" (Doc. 90, Sec. 98, R. 123).

*Rivers*" (Col. Oliver, R. 253). "When the crest of the 1937 flood reached the mouths of the Arkansas and White Rivers the discharge from those rivers was 100,000 cubic feet as compared with 1,200,000 cubic feet in 1927" (petitioner's expert Clemens, R. 263). "I do not think the 1937 flood is a proper test of the efficiency of the cut-offs. \* \* \* Had there been water in the Arkansas and White Rivers in 1937, comparable to 1927, the fuse plug levee could not have safely carried the combination of the two floods past the fuse plug without the diversion into the Boeuf Floodway as planned" (Carter, R. 284).

*Volume.* "The momentary peak flow into the Boeuf Basin in the vicinity of Cypress Creek may be 1,250,000 cubic feet per second, the average for about 10 days being about 900,000" (Doc. 798, p. 44, R. 139). "A million cubic feet a second must be taken out of the river" (Gen. Markham, R. 145-146). "Over a million feet has to go out of of there whether anybody likes it or not (Gen. Markham, R. 140-141). "The 1928 Act contemplates a flood of 25% to 30% in excess of the estimated 1927 flood, called the project flood, which would necessitate the escape of more than 1,000,000 cubic second feet of water through the fuse plug levee down the Boeuf Floodway" (Neptune, R. 161-162).

Other than death and taxes, we know of nothing more certain that the ultimate use of the Boeuf Floodway as designed and intended under the present law, and under the physical conditions as they existed when respondent filed her suit on August 11, 1934 (R. 16).

The constant nightmare which has terrified the property owners behind this fuse plug levee since the destruc-



tion authorized by the Flood Control Act of May 15, 1928, became a certainty, and which continues, the dread horror and dismay which has caused inhabitants to flee in panic and which has kept all substantial buyers out of the territory, resulting in the paralyzation and destruction of all normal market values, is the perennial knowledge that this fuse plug sector in the levees *must* "fuse," crevasse, blow-out or be overtopped when enough water gets against it; that it was so designed and intended by petitioner's engineers who have expended fabulous sums of money predicated upon it doing so; and that this continuous flood hazard is utterly unavoidable because it is crystallized into the very law of the land by the Flood Control Act of May 15, 1928. Not only is this imminent danger justified by the law and evident from the official maps of the Jadwin Plan, but *now* any property owner has only to look at the great levees across the river in the State of Mississippi, and to the north and south of petitioner's "fuse plug levee" in order to realize the *physical facts* which make his doom inexorable.

Furthermore, every Chief of Engineers since May 15, 1928, on every appropriate occasion and before every congressional investigation of the subject, has repeatedly assured respondent and her neighbors of the inevitable, ultimate destruction of their property. Even since this case has been pending on appeal, the new Chief of Engineers, Major General Julian L. Schley, has *again* assured the Congress that, notwithstanding every fact in the record in this case, the diversion floodway to the west, south of the Arkansas River, is still *an integral and essential* feature of the plan—not merely an additional factor of safety.

functions are: *Floodways* \* \* \*. These will relieve the main channel of the water it can not carry and lower the floods to stages at which the levees can carry them" (Doc. 90, Sec. 3, R. 119). "The excess must be spilled through *safety valves* when the volume exceeds the safe capacity of the river. *These safety valves* consist of one controlled spillway, several relief or fuse plug levees at present levee grade and one levee of reduced height" (Doc. 90, Sec. 97, p. 23, R. 123). Of these safety valves, the Boeuf Floodway "is the most critical from the viewpoint of flood control" because of the large discharge from the White and Arkansas Rivers (R. 144), and is therefore probably the *most essential*. It is absolutely necessary (Neptune, R. 160).

The United States has paid for flowage rights in the Bonnet Carre Floodway (R. 137). The United States has paid for flowage rights in the New Madrid Floodway (R. 142; *United States v. Hess*, 70 Fed. (2d) 142, 71 Fed. (2d) 78). There is no justifiable distinction, so far as Government liability is concerned, between either of these authorized floodways. The fuse plug spillway which creates the Boeuf Floodway of which "the United States must have control \* \* \* and keep it substantially at its present strength and present height" (Doc. 90, Sec. 120, R. 124), creates a condition which is the same in effect as if the entire existing levee line had been left alone except to cut down the fuse plug levee three feet lower than all adjacent levees (Wonson, R. 173). To property owners on the floor of either of these floodways it is utterly immaterial how the United States created the physical condition which uses each floodway alike for an enormous artificial diversion of flood waters from the main channel of the Mississippi

River. When property by law is put into a definite auxiliary channel of the Mississippi River for use in flood-times, by definite and predetermined design, its market value is destroyed. *Res ipsa loquitur*. The application of common knowledge to an examination of the map of the Jadwin Plan is sufficient to establish this point.

This Court, we submit, will affirm the judgment of the Circuit Court of Appeals which holds: "This comprehensive plan binds together the lands on both sides of the river as parts of the same section of the alluvial valley." *Sponenbarger v. United States*, 101 F. (2d) 506 at p. 512.

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as in the northern and southern sections, had been *completed* at the time of the trial, and were in operative condition prior to the filing of respondent's suit (R. 142-143, 144).

The Chief of Engineers in testifying before the Senate Committee on January 27, 1936, stated: the northern section "is *practically complete* and I think would take super-flood" (R. 147); "down to the Arkansas River there is no trouble in confining the water of the Mississippi between the leveed channels" (R. 147); "the southern section from the latitude of the proposed Morganza Floodway down to the Gulf is practically complete. It is *essentially complete*" (R. 147); "the levees on the south bank of the Arkansas are complete up to full superflood height" (R. 147-148); "all parts of the project works in the middle section except the Boeuf Floodway and the raising of the main river levees adjacent to its head *have, in general, been completed*" (R. 142-143). Floods in the lower Mississippi Valley cannot be successfully controlled without the Boeuf Floodway. *In a superflood there is no question but that the fuse plug levee would crevasse south of the Arkansas River on the main stem of the Mississippi River* (Markham, 1936, R. 148).

"The United States *began actual construction* of the unified, comprehensive project authorized by the Flood Control Act of May 15, 1928, commonly known as the Jadwin Plan, affecting the middle section of the Mississippi River, January 10, 1929, the date of the approval by the President of the recommendations of a Special Board authorized by Section 1 of the Act. The construction work *has gone on continuously since the final approval of the plan on January 10, 1929.*"

"The fuse plug levee is 3 feet lower and approximately just half as large by volume as those other levees constructed by the United States under the 1928 Flood Control Act." "In September-October, 1935, we made an actual survey of the fuse plug levee, and prepared a graph which represents the condition of the levee at the time of the filing of the present suit (see R. 393 and 395). At that time the *weakest point of the fuse plug levee* which would most likely crevasse under the stress of a flood was in the vicinity of Cypress Point revetment, about 2 or 3 miles north of the bottle neck in the vicinity of Arkansas City. A bottle neck means where the levee lines are very close together constricting the floodway width of the river to an extreme amount as compared with the width above and below" (Neptune, R. 158).

"The point on the fuse plug which is now weakest, and which will be *the probable point of crevasse* when tested by a major flood is about Lucca Landing; about 2 miles north of this new set-back levee. Through this crevasse the water would go right into the Boeuf Floodway. This is in the section of the levee which is designed to open up into the floodway.

"When this suit was filed in 1934, the fuse plug levee I have just described was in such condition that it would be overtopped and breached to provide for the escape of flood waters as was designed and contemplated by the Flood Control Act of May 15, 1928; and *that condition still exists*. The fuse plug levee *has been in such operative condition* as contemplated by the Flood Control Act of May 15, 1928, for the *past 5 or 6 years*.



This has all been definitely accomplished, and the fuse plug levee at the head of the Boeuf Floodway will now "surely" SERVE ITS PURPOSE.

"No part of this fuse plug levee breached or crevassed during the 1927 flood" (Neptune, R. 161), but NOW, because of the construction work done by petitioner under the Flood Control Act of May 15, 1928, "Any flood beyond that of a magnitude around 30% less than the 1927 flood, of the type of the 1927 flood, would overtop and crevasse the fuse plug levee. \* \* \* For the past 5 or 6 years any flood approximately 30% less than the 1927 flood would have overtopped and crevassed the fuse plug levee. \* \* \* Under the present law and the conditions resulting therefrom, *it is certain that the fuse plug levee will crevasse* in the event of a flood of the size and type of 1927, and larger. There is no chance of the fuse plug levee holding with the levee lines all around it three feet higher and built to carry three feet more of water than this fuse plug levee. The functioning of the fuse plug levee as contemplated by the Flood Control Act of May 15, 1928, is *certain*" (Neptune, R. 161-162).

"Any flood coming out of the White and Arkansas Rivers joining with that of the upper Mississippi River that can safely pass through the constricted channel of the Mississippi River known as the bottle-neck near Arkansas City, can be safely carried through the widened channel south of the bottle-neck and past the fuse plug levee. *The fuse plug levee would crevasse, if at all, in the upper portion of the fuse plug levee before reaching the bottle-neck*" (Neptune, R. 165).

Mr. Neptune is corroborated by Mr. Wonson (R. 168, 169), and by Mr. Simons (R. 175, 177, 178).

The Mississippi River pays little regard to the estimates of man. However it has been estimated that the Boeuf Floodway would be used, on an average, of once in 12 years (Doc. 90, Sec. 119, R. 124; Doc. 1, p. 19, R. 143). But no man dare guess *what year* the flood will come. Respondent's property is subject to the flood menace and hazard *every year*. It may come *any year*. "The magnitude and frequency of future floods are not predictable in America" (Wonson, R. 172). "It is well to note at this point that *past estimates of floods have been much in error by under-estimation*" (Doc. 798, p. 2, R. 137). "The confinement of the Mississippi River within levees and the great development of drainage systems in recent years have *raised flood stages materially* and this raising has exceeded estimates made in the past" (Doc. 90, Sec. 96, R. 122). Petitioner's expert Mathes sees "*nothing unusual* in the fact that there have been *three successive* floods in the years 1934, 1935 and 1936" (R. 245).

\* The fuse plug levee would have breached, and the Boeuf Floodway would have functioned, during the flood of 1937 out of the Ohio River, if it had been materially augmented by floods at the same time out of the upper Mississippi, or out of the Arkansas and White Rivers, such as the combination of floods in 1927.

"Had the large storage basin at the mouths of the Arkansas and White Rivers been full in 1937 when the crest of the Ohio flood reached the latitude, as they were in 1927, the fuse plug levee would have overtopped" (Neptune, R. 166). "When the 1937 flood was coming I told the people of Arkansas and Louisiana that there was no danger whatever south of the Arkansas River *because of the emptiness of the reservoir area back up the Arkansas and White*

### POINT III.

**BOEUF FLOODWAY is in OPERATIVE CONDITION. The authorized GUIDE LEVEES ARE IMMATERIAL to respondent's right of action. Certainty of Operation.**

Regardless of all theory and argument to the contrary, respondent's property had actually been taken for a floodway prior to the filing of her action. It is on the floor of a floodway today, and will doubtless continue subject to the constant menace of use as a floodway for an indefinite future period of time. It is true that the guide levees which were intended to be constructed inland, both east and west of respondent's property, for the purpose of limiting the area to be flooded, and for the purpose of protecting areas outside of the designated pathway of the diversion, have not been constructed; but this fact is wholly immaterial both (1) so far as the destruction of the market value of respondent's property is concerned, and (2) so far as the functioning of the fuse plug levee as a safety-valve spillway is concerned. The only difference in the Boeuf Floodway as originally intended and now, is that it was originally intended that the floodway should be controlled by guide levees on either side, whereas now the floodway is uncontrolled save by the parallel natural ridges which carry the water in a southerly direction to the back-water area at the mouth of Red River. None of this has any material effect on respondent's property. The failure of the Government to build the guide levees simply means that a little more area will be used as a floodway than was originally intended. Respondent's property lies squarely in "the mouth of the gun" at the head of the floodway, and she is not concerned with what becomes of the water after it has washed her property away.

The Court will note the distinction between the words "*spillway*" and "*floodway*." The spillway is properly the fuse plug levee, safety valve, or weaker relief levee which is overtopped or gives away so as to spill the water out of the main channel. The floodway is the pathway flooded by this water after it has been spilled out over the spillway.

The District Court erred in stating in its opinion that: "The Government did not proceed with the construction of the Boeuf Floodway" (R. 380), and "that floodway is not now and never has been in an operative condition" (R. 388). See Assignments of Error Nos. 233, 238 (R. 112-113) which were properly corrected by the Circuit Court of Appeals.

The District Court erroneously cited as authority for its statement Com. Doc. 1, Sec. 9, which states: "all parts of the project works in the middle section, except the Boeuf Floodway and the raising of the main river levees adjacent to its head, *have in general been constructed*. Because of local opposition the construction of the Boeuf Floodway levees have not been undertaken" (R. 380). The Court will notice that this statement relates *only* to the *completion* of the project. It has no reference whatever to the *beginning* of the work on the project as a whole; nor does it suggest that the fuse plug *spillway* has not been completed. The fact that the absence of the protection or guide levees permits floods to extend over more area than was contemplated does not in the least lessen the flood hazard in the Boeuf Floodway to which respondent's property is constantly subjected (See R. 85).

The fact is that substantially all work of construction in the middle section, *including the Boeuf Spillway*, as well

"Plaintiff's property is practically in the middle of the entrance of the Boeuf Floodway as designed by the Flood Control Act of May 15, 1928" (Neptune, R. 159):

"Approximately 85% to 90% of the work on that levee system had been *completed in the fall of 1934*; and approximately 90% to 95% of the system of the main river is completed at the present time" (Neptune, R. 157).

This testimony is corroborated by Wonson, R. 167, 168, 170, 171; and by Simons, R. 175, 176, 177, 178; and by petitioner's chief expert witness Mathes, R. 246, 247, 248, 250; and by General Ferguson, General Markham, and Col. Oliver (R. 249); and Capt. Seybold (R. 258). *It is an indisputable physical fact.*

"The escape of flood waters through Boeuf Basin is, and for a number of years has been, an essential feature of this Jadwin Plan *which is in operation.*" (Petitioner's chief expert Mathes, R. 148).

"The general location of *plaintiff's property is now in one of these particular floodways, at the most critical point of the river just below the mouth of the Arkansas.* . . . The plaintiff's property has been on the floor of that floodway, very near its head, since the passage of the Flood Control Act of May 15, 1928" (Mathes, R. 250).

"And the people within the floodway itself are subject to flood right now, and they are not going to have their flood menace actually increased by the plan which we propose" (District Engineer Oliver in April, 1935, R. 249).

The *guide levees are immaterial* as affecting appellant's property, or the designed diversion (Doc. 90, Sec. 118, R. 124).



"The restriction of flow by means of *side or protection levees in these basins is not essential* to the escape of the flood waters but is advisable for the protection of said lands, and for the protection of life and property, where the cost is not excessive" (Doc. 798, p. 26, R. 138). "*The protection levees are not at all essential* to the proper functioning of the plan in the adopted project but were included merely to furnish local protection or reclamation" (Doc. 798, p. 47, R. 139). "With regard to the adopted project attention must be invited to the protection levees in the Boeuf and Atchafalaya Basins which have been protested by local interests and to the fact that *these levees are not essential to the proper functioning of the plan* but are merely to afford the maximum amount of local reclamation in the basin which was thought economically justifiable" (R. 139).

"The construction of the *guide levees* in the Boeuf Floodway is in *no way essential* to the functioning of the *fuse plug levee*. They limit the amount of land that may be subject to floodway flow. *They do not limit the entrance*. So far as damage to the plaintiff's property is concerned, the construction of these guide levees would have very little effect one way or the other" (Neptune, R. 162-163). "The guide levees on either side of the Boeuf Floodway as prescribed by the Flood Control Act of May 15, 1928, have not been constructed. Their construction would have no substantial effect upon the plaintiff's property. *The guide levees are not necessary to the operation of the fuse plug levee as contemplated by the 1928 Act*. The fuse plug levee is now serving the purpose for which it was designed under that Act. This has been true for 5 or 6 years" (Wonson, R. 170-171). "The guide levees

of the Federal Government as being only that of a gratuitous contributor, *without responsibility or liability*, to the states and local interests who were charged with the prime duty and burden of flood control. *No compulsion* of the states, local interests, or individual property owner was involved.

The year 1927 marks the greatest flood of record in the lower valley. Flood levels attained unprecedented heights and losses exceeded those ever before experienced in the valley. For the first time in history, completed and seasoned levee works constructed to the standards recommended by the Mississippi River Commission proved of inadequate height and therefore failed. This flood disaster again attracted National attention and sympathy. Long hearings were held by the Flood Control Committee of the House of Representatives of Congress and many plans were advanced for the effective control of floods in the valley. It early became apparent that National assistance in flood control work would be extended to an extent unprecedented in the history of the United States, and perhaps in the history of the world. Two noteworthy plans for flood control were submitted to Congress: that of the Mississippi River Commission and that of the Chief of Engineers. Both plans provided for the repair, strengthening and extension of the existing levee system, and the construction of *floodways* to accommodate flood waters in excess of the capacity of the leveed channel of the main river, *by the Federal Government*, the petitioner in this case. After months of consideration the plan of the Chief Engineers (Jadwin Plan) was adopted by Congress in the *Flood Control Act of May 15, 1928*.

The passage of this law marks the end of the first period of the history of the Mississippi River Commission, since the Act effected certain definite changes in the organization, duties and jurisdiction of that body. In its technical features, this Flood Control plan was conceived on a scale far grander than any theretofore proposed, and it is based on concepts and theories somewhat different from those underlying previous plans. But the most profound and fundamental change made by this Act in flood control legislation, and in the *corpus juris* of flood control works, is that, *for the first time in history*, the Congress deliberately and expressly recognized and *assumed national responsibility and liability* for the solution of this national problem.

This period ending with the passage of the Flood Control Act of May 15, 1928, was marked by exhaustive studies looking toward the development of proper methods of flood control *for use by the National Government* when the United States was ready to assume national responsibility. Vol. I "Mississippi River Flood Control and Navigation," *supra*, pp. 13-20.

D. *Operations since May 15, 1928.* By this Act the Mississippi River Commission ceased to be an executive body and became only an advisory and consulting body. The responsibility for the prosecution of the work was definitely placed upon the Chief of Engineers, War Department, representing directly *the United States*, responsible directly to the Congress. Vol. I, "Mississippi River Flood Control and Navigation," p. 20.

"The alluvial valley of the Mississippi River may justly be called the cradle of *national* flood control. Long be-

Acts were passed as a gratuity to the states for the purpose of assistance *without responsibility*. The failure of the states to carry out the purposes of these acts doubtless caused the Federal Government eventually (May 15, 1928) to assume the responsibility for the protection of this enormous and important national acreage against the floods which are gathered from the extremities of the Nation. Vol. I "Mississippi River Flood Control and Navigation," *supra* pp. 7-13.

C. *Operations of the Mississippi River Commission to 1928.* The national need for improvement for navigation and flood control was generally recognized by the year 1879. The necessity for co-ordination of engineering operations through a centralized organization was apparent. Reports submitted from time to time during the period just ended had stressed the magnitude of the problem and had discussed most of the methods of flood control which have since been advanced. However, the Congress was still unwilling to assume responsibility for the task, with resulting liabilities. It had reached the point of being willing to advise and supervise, with some contribution toward costs.

In 1879 a bill was introduced in Congress providing for the creation of a Mississippi River Commission. The opponents of the bill based their objections mainly upon the contention that the flood protection of alluvial lands was the sole responsibility of the states and local communities. They feared that the passage of the law would result in the ultimate expenditure of the National Government of vast sums for flood protection in the Mississippi valley. The bill became law June 28, 1879, creating the Mississippi River Commission consisting of seven members appointed


by the President. (21 Stat. 37; Title 33, U. S. C. A., Secs. 641, et seq.) The Commission was charged with the preparation and consideration of *plans* to improve the river channel, protect its banks, improve navigation, prevent destructive floods, and promote and facilitate commerce and the Postal Service. Although the Commission's jurisdiction was to become extensive, its powers and functions were strictly defined. The Commission was given much executive authority and money for the purpose of improving *navigation*, but the Congress carefully avoided any national responsibility for flood control. The Commission could only advise, and supervise, and make contributions toward flood control work done by the states and local interests (levee districts formed and financed by the local property owners).

The so-called First Flood Control Act, approved March 1, 1917 (39 Stat. 950; Title 33 U. S. C. A. Sec. 701), was carefully drafted in strict conformity to this national policy of non-liability on the part of the United States, which had then become a part of the *corpus juris* of the land by judicial decisions. See *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363; and *Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374, both decided June 16, 1913; and *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041, decided June 5, 1916.

The Second Flood Control Act of March 4, 1923 (42 Stat. 1505; Title 33 U. S. C. A. Sec. 701) extended the jurisdiction of the Commission from Head of Passes to Rock Island, and up the tributaries and outlets of the Mississippi River so far as they might be affected by Mississippi flood waters, but still carefully preserved the status



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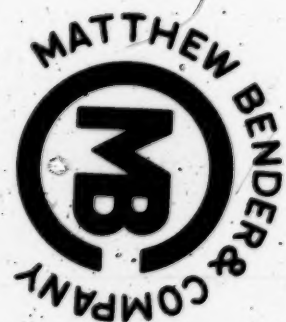
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States. His report on the Mississippi River was the most complete one made up to this time, and has exercised a very considerable influence on later thought. In fact, it is significant to note here that as early as 1852 the Congress was advised by Ellet's report (contained in Committee Document No. 5, 70th Congress, 1st Session), that in order to control the floods of the Mississippi River a floodway south of the mouth of the Arkansas River, west of the Mississippi, practically the same as the Boeuf Floodway of the 1928 Act, *would eventually be necessary*. See Plate LXVII, Vol. III "Mississippi River Flood Control and Navigation," *supra*.

Ellet stated in his report that the *floods* in the alluvial valley of the Mississippi River *would increase in frequency and extent* with the increase in cultivation in the valley and the extension of the levee system. Vol. I "Mississippi River Flood Control and Navigation," *supra*, at p. 9.

Congress at the time was apathetic.

By Act of Congress, approved September 30, 1850, \$50,000 was appropriated for the preparation of a topographic and hydrographic survey of the Delta of the Mississippi; and for investigations to determine the most practical plans for flood control and for navigation improvement at the river mouth. The final report of this survey, commonly known as the Delta Survey, was submitted in 1861. Again it was pointed out that ultimately a *floodway* would be necessary on the west bank of the Mississippi River, extending southward from the general vicinity of the mouth of the Arkansas River. See Plate LXVIII, Vol. III "Mississippi River Flood Control and Navigation," *supra*.

It is rather startling to see how closely these floodway lines, proposed as long ago as 1852 and 1861, in Arkansas follow the present lines of the Boeuf Floodway, and the proposed Northern extension of the Eudora Floodway, as finally actually authorized to be constructed by the Flood Control Act of May 15, 1928. The final action of the Congress was the culmination of the deliberations of experts for more than 75 years. Compare Plates LXVII, LXVIII, and LXIX, Vol. III "Mississippi River Flood Control and Navigation," *supra*.

The Civil War period was attended by a cessation of work on the river. Levees were allowed to fall into disrepair and the floods of 1862 and 1865 did great damage to the levee system which had been constructed by local property owners. The year 1874 found the levee system in the lower valley in a condition still worse than that of 1859 when the flood of 1859 caused a total of 32 crevasses. The flood of 1874 did considerable damage in the valley, and as a result a board of engineers known as "Levee Commission" was directed to make an examination of the levee system and to submit a plan for the reclamation of the Alluvial Valley. Congress authorized certain surveys of transportation routes to the seaboard.

The year 1879 marks the end of the period of Federal operation prior to the creation of the Mississippi River Commission. This period was characterized by many voluminous studies and reports, of which those of Ellet and the Delta Survey are outstanding. This period is marked by the first effort on the part of the Federal Government to assist the states in the solution of the flood control problem, but the Congress very carefully refrained from assuming any national responsibility or liability therefor. The Swamps

As late as March 30, 1938, General Schley assured the Congress, the respondent, and this Court, that: "Nothing has developed which makes it appear that our comprehensive report of April 6, 1937, is not to be retained as the fundamental solution of flood control on the Mississippi" (which report of April 6, 1937, Sec. 7, requires "*floodways below the confluence of the White and Arkansas Rivers to carry flood waters in excess of the capacity of the levee system*). "*We still have to take the water out.*" If you had a flood in excess of the present levee capacity of the river, the means of safety provided is the *blowing of the fuse plug levee south of the Arkansas*. "That is the reason it was left at its lower height *for that purpose*. That was the original purpose, and goes back as far as the report of 1928, the Jadwin report. \* \* \* *A diversion channel in the middle section is necessary.*" (HEARINGS, House Committee on Flood Control, March 30, 1938, pp. 9, 10, 17, 18, 20).

On March 31, 1938, General Harley B. Ferguson, as President of the Mississippi River Commission, testified before the House Committee on Flood Control in Washington: "*The adopted project, as we refer to it, generally means the project approved in the Flood Control Act of May 15, 1928, which contemplates the Boeuf diversion in the middle section. The main line levees were to be raised substantially 3 feet, and that work has been accomplished. \* \* \* We now have a floodway that is not leveed. With that low levee on that side it would break before it does on the other side. \* \* \* A large flood would not destroy the protective work we have now because they would blow a hole in it (the fuse plug levee) and the rest would all be saved. \* \* \* We have spent \$600,000,000 on this river. We could take care of a major flood of 3,200,000 cubic second feet if*

*the floodway was operating.* That is what we set out to do by the legislation. To limit the places where the water goes away would not be wise. We are spending an awful lot of money. Since we made that estimate, we have had great floods coming out of the Ohio, and we have had rain-falls out West away beyond all records. The freeboard we think we should have, and what we have contended for along there, is five feet. We have contended for a *five-foot freeboard.*" (HEARINGS, House of Representatives, Committee on Flood Control, March 31, 1938, pp. 36, 48, 53, 54, 55).

On March 22, 1939, *after* the decision of the Circuit Court of Appeals in this case, the Chief of Engineers again announced that the Jadwin Plan, which he again calls "the comprehensive project," necessarily including the fuse plug levee spillway at the head of the Boeuf Floodway, is actually operating "*true to its design.*" He publicly announced:

"As you know, flood control work in the alluvial valley is being prosecuted under authorities contained in the Flood Control Acts of May 15, 1928, June 15, 1936, and June 28, 1938, which authorize the appropriation of \$637,000,000 for this purpose. \* \* \* highly satisfactory progress has been made. The valley has enjoyed 12 long years without accidents and overflows, despite the fact that several high waters have occurred with crests that exceeded those of former floods which caused great damage. Although *the comprehensive project has operated true to its design*, let us not be lulled into a false sense of security, for construction has not yet reached the point that would enable this project to protect the valley lands against the maximum predicted flood. Such a flood may not occur, but it is



prudent to prepare for such an eventuality as rapidly as practicable. The Department is therefore vigorously prosecuting those works to which local interests have agreed and is also strengthening the existing works wherever the need has been indicated." (Congressional Record of March 22, 1939, Appendix, p. 4415).

Does this not demonstrate beyond cavil that the District Court labored under a complete misapprehension of the actual, existing physical fact when it erroneously stated "that floodway (Boenf Floodway) is not now and never has been in an operative condition?" (R. 388).

The judgment of the Circuit Court of Appeals on this point is clearly right.

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## POINT IV.

### FEDERAL RESPONSIBILITY

**HISTORY.** "The history of the Lower Mississippi River for flood control and navigation falls naturally into four periods.

"The first period may be described as that of discovery and settlement. It begins with the discovery of the river and ends with the beginning of Federal river engineering operations.

"The second period covers the history of investigations and engineering operations by the Federal Government up to the creation of the Mississippi River Commission in 1879.

"The third period embraces the operations of that Commission from its creation until the passage of the Act of May 15, 1928.

"The fourth and last period begins with the reorganization of the Mississippi River Commission, as provided for in the Act of May 15, 1928, and covers the engineering operations called for by that law." Vol. I "Mississippi River Flood Control and Navigation," by U. S. Army Engineers, War Department, United States Waterways Experiment Station, Vicksburg, Mississippi, May 1, 1932, at p. 1.

**A. *Discovery and Settlement.*** Credit is popularly accorded to Hernando de Soto for being the first white man to discover the Mississippi River, which the De Soto expedition first saw on May 8, 1541. There is however much evidence to show that the existence of the river was known

to other earlier explorers. Indeed, Columbus himself may have been the first European to observe this river on his fourth voyage which began in 1502.

The city of New Orleans was founded in 1717. The building of the Mississippi River levees began with the first settlements in the lower alluvial valley. The engineer who laid out the city of New Orleans planned a dike or levee to protect the city from overflow. It was extended rapidly by the individual property owners for miles above and below the city. The extension of these levee lines kept pace with the establishment and growth of settlements. Each planter was required to complete the levee along his own river front. By 1844 these levees were continuous, though often ineffective, from 20 miles below New Orleans to the mouth of the Arkansas River on the right bank, or west side of the river.)

By 1820 the period of discovery and settlement had come to a close. The Mississippi River was now entirely within the territorial limits of the United States. The lower river valley was comparatively well settled in its southern areas. A levee system for the control of its floods had definitely begun. National attention was directed to the river. "Mississippi River Flood Control and Navigation," *supra*, at pp. 1-6.

B. *Operations of Federal Government prior to 1879.* Federal operations on the Mississippi River date from 1820. The attention of the National Congress was directed first to the requirements of navigation, rather than to the problem of flood protection. In 1820 Congress appropriated the sum of \$5,000 for the preparation of a survey, maps and charts of the Ohio and Mississippi Rivers with a view to the improvement of these rivers for navigation.

By 1845 the demand for navigation improvement had apparently crystallized into a definite problem demanding an engineering solution. In 1845, before a convention held in Memphis, Mr. John C. Calhoun, the presiding officer, made a noteworthy speech in which he advanced the view that *both flood control* protection and navigation improvements were *national* rather than local problems.

The floods of 1849 and 1850 created widespread damage and increased the growing national interest in the problem of flood control. By the Swamp Acts of 1849 and 1850, the National Congress granted *to the several states* all unsold swamp and overflowed lands within their limits. Under the provisions of the acts, funds accruing from the sale of these lands by the states were to be applied *by the states* to the prosecution of drainage, reclamation, and flood control projects. As might have been expected, this attempt to secure effective flood protection *failed*, due primarily to the lack of co-ordination of the work among the different states and districts. While this was a step in the right direction, no effective steps were taken to co-ordinate these laws among the states. Such progress as was made under the Swamp Acts was ineffective. As a national flood control measure the laws were a signal failure. ◊

Notwithstanding the fact that the National Government was actually doing nothing to protect the valley from floods, the interest of Congress in the problem nevertheless continued. Pursuant to an Act of Congress, the Secretary of War in 1850 directed Mr. Charles Ellet, Jr., an engineer, to make surveys and reports on the Mississippi and Ohio Rivers with a view to the preparation of adequate *plans for flood prevention* and navigation improvement. Ellet was the pioneer in flood control engineering in the United

000,000, it necessarily follows that not only has respondent's property been taken, but furthermore her future right to defend her property has been seriously restricted and impaired, if not practically destroyed. The right of self-defense, including the right to defend one's property, is both elemental and fundamental in natural law. Constitutional or statutory declarations of this prime principle of natural law are unnecessary. Self-preservation is indeed the first law.

It cannot be fairly doubted that the petitioner United States has exercised its sovereign right of eminent domain to the detriment and restriction of this right of respondent to defend her property. See *Cubbins v. Mississippi River Commission*, *supra*, 60 L. ed. 1041, at p. 1047, *et seq.*

Nor can it be doubted that the Congress legally exercised this sovereign right. The Congress has complete control over the navigable rivers of the United States. *Scranton v. Wheeler*, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126, at p. 136.

"It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

*United States v. Chandler-Dunbar W. P. Co.*, 229 U. S. 53, 33 S. Ct. 667, 57 L. ed. 1063, at pp. 1075-1076.

*Gilman v. Philadelphia*, 3 Wall. 713, 724, 18 L. ed. 96, at p. 99.

*Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668, at p. 670, and 671-672.

That Congress has finally "brought its full power into activity" has exercised its "exclusive jurisdiction," and by



the passage of the Flood Control Act of May 15, 1928, has deliberately assumed full and *exclusive* control of the fuse plug levee, is manifest and indubitable. This *fact* certainly cannot be doubted by anyone familiar with the Act, with the provisions of House Document No. 90 which the Act adopts and thereby enacts into law, and with the congressional debates in explanation thereof.

The Flood Control Act of May 15, 1928, adopts and enacts into law the following Congressional regulations:

"The United States *MUST* have *control* over the Cypress Creek levee and *keep it* substantially at its present strength and present height." Doc. 90, Sec. 120, R. 124.

"A flood way for excess floods is, *provided* down the Boenif River, on the west side of the river. \* \* \* The entrance to the flood way is closed by a *safety plug section* of the levee, at present grade, which is located at Cypress Creek, near the mouth of the Arkansas. To *insure* their safety until this section opens, the levees of the Mississippi, from the Arkansas to the Red, will be raised about 3 feet." Doc. 90, Sec. 16, R. 120.

"The levees generally will be raised about 3 feet, so that the *selected, weaker relief levees* will be at about the elevation of the present levee top and will *surely* serve their purpose." Doc. 90, Sec. 98, R. 123.

"The practical remedy is to raise the levee grade 3 feet on both sides of the Mississippi below the Arkansas River, to strengthen these levees so that they will not fail from causes other than accident or overtopping, and to preclude overtopping by *insuring that the water in excess of the capacity of the leveed channel be spilled out near the mouth of the Arkansas.*" Doc. 90, Sec. 117, R. 123.

v. *United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374; and other decisions prior to the Flood Control Act of May 15, 1928, relied on by petitioner. This plan and right of local self-defense was fundamentally changed by the Flood Control Act of May 15, 1928.

Under the present law, the Jadwin Plan "*limits*" the amount of flood water carried in the main river \* \* \* and *sends* the surplus water through lateral *floodways*" (Doc. 90, Sec. 3, R. 119). These words "*limits*" and "*sends*" imply *human* interference with natural conditions. Notice how this element of human choice and artificial direction is reflected by the language used throughout the entire description of the engineering plan adopted. For instance: "The water which can not be carried in the main channel with the levees at reasonable height *must be diverted*" (Doc. 90, Sec. 7, R. 119); "the floodways *allotted*" (Doc. 90, Sec. 8, R. 120); "a floodway for excess floods is *provided* down the Boeuf River" (Doc. 90, Sec. 16, R. 120); "to *insure*" (Doc. 90, Sec. 16, R. 120); "to *prevent* flood waters from entering the Tensas-Basin, *except through the floodway*" (Doc. 90, Sec. 16, R. 120); "the practical means to meet this situation is to *spill the water out* of the main leveed channel at *selected* points when the stages reach the danger point" (Doc. 90, Sec. 96, R. 123); "the excess *must be spilled* through safety valves" (Doc. 90, Sec. 97, R. 123); "the *selected*, weaker relief levees" (Doc. 90, Sec. 98, R. 123); "to *preclude* overtopping by *insuring* that the water in excess of the capacity of the level channel *be spilled out* near the mouth of the Arkansas" (Doc. 90, Sec. 117, R. 123); "to *insure* \* \* \* a fuse plug section \* \* \* *must be kept*" (Doc. 90, Sec. 118, R. 124); "the Boeuf River bottom is *selected* for this diversion" (Doc. 90, Sec. 119, R. 124); "the

United States *must* have control over the Cypress Creek levee and *keep* it substantially at its present strength and present height" (Doc. 90, Sec. 120, R. 124); "the draw down from the Cypress Creek relief levee into the Boeuf River diversion below makes it *possible to protect* the lower part of this section of the levee" (Doc. 90, Sec. 127, R. 124-125); "the fuse plug levee *decided upon*," a human choice (Doc. 90, Sec. 134).

"The word 'diversion' used in the Flood Control Act of May 15, 1928, I understand to mean the *taking* water out of the main channel of the Mississippi River and *passing* it laterally into a detour or route around the main channel in order to *handle* the amount of water in excess of the capacity of the levee system below the point of diversion. . . . A *diversion channel* on the west side of the Mississippi River in the middle section is a specific requirement of the 1928 Act, and is *absolutely necessary* for flood control under the provisions of that Act" (Neptune, R. 160). "There is a difference between a *natural outlet* from the river and an *artificial diversion*. A natural outlet is one that exists in a state of nature, as may be found by a creek entering the river which at times of flood receives the flood flow of the river; whereas a *planned diversion* is an area artificially set up to insure that at predetermined stages water will pass through the protecting work, such as in this case the levee line (Wonson, R. 171).

In discussing the possibility of the Eudora Floodway as a substitute for the Boeuf Floodway, involving the identical principal of legal right in so far as the property owner is concerned, General Markham, then Chief of Engineers, in January, 1937, frankly told the Congress that such a floodway involved a *deliberate taking* of private property for

public use for which compensation must be made (R. 145-147). "The only thing the United States is proposing is that instead of having a sporadic, indefinable crevasse somewhere—and that is what we have always had in the past—we *definitely put it down with prediction, and pay the flowage for that purpose*" (Markham, R. 146-147). "We are *taking* these floodways and *physically*, by the work of the United States, *directing* these additional flood waters over particular property, and *that creates a Federal obligation*" (Markham, R. 149). "*We are physically, deliberately putting additional flood waters down in a certain territory, and thus deliberately creating an obligation for the acquirement of those flowage rights, believing that is the proper course for getting a diversion so that the whole river below will be protected in this, the only way we know how to protect it, confining it to a specific floodway*" (Markham, R. 150).

All of the foregoing had been completely accomplished by the creation of the fuse plug levee at the head of the Boeuf Floodway, as a physical fact, before respondent's suit was filed.

2. *Federal control over the fuse plug levee which creates the Boeuf Floodway.*

The District Court erred in refusing respondent's requested Conclusion of Law No. 56 (R. 348) which correctly declares: "Since January 10, 1929, the United States has had and exercised the complete legal right of supervision and control over the fuse plug levee at the head or entrance of the Boeuf Floodway for the purpose of keeping it as a fuse plug levee to function as designed, intended, contemplated and authorized by the Flood Control Act of May 15,

1928 (Doc. 90, Secs. 16, 98, 117, 118, 120 and 149; Sec. 9, Flood Control Act of May 15, 1928, Title 33 U. S. C. A., Sec. 702i; 30 Stat. 1152, Title 33 U. S. C. A., Sec. 408; 39 Stat. 950, Title 33 U. S. C. A., Sec. 701; 42 Stat. 1505, Title 33 U. S. C. A., Sec. 702; *Houck v. United States*, 201 Fed. 862; *Cape Girardeau & T. B. T. R. Co. v. Jordan*, 201 Fed. 868),” R. 348-349.

The District Court erred in stating: “The landowners, prior to 1928, had no right to elevate the established grade (R. 388). Equally erroneous is the further statement of the District Court that: “There is nothing in the Act that restricts the privilege of property owners to participate in a ‘flood fight’ by supporting the river front levee, when it is endangered” (R. 388).

The Circuit Court of Appeals corrected these errors of law, 101 F. (2d) at p. 510.

Prior to the Flood Control Act of May 15, 1928, the Mississippi River Commission established grades and sections of levees as being ideals which local levee districts should strive to attain, but they were *not compulsory*. No law can be cited to support the erroneous statements of the lower Court just quoted. See R. 89-90. Prior to 1928 the Mississippi River Commission had no authority or control whatever over the construction or maintenance of levees save the right to refuse to co-operate with local levee districts in the construction of levees by contribution of Federal funds unless the local levee districts would agree to recommendations made by the Mississippi River Commission. See Title 33 U. S. C. A., Secs. 701, 702. There was nothing in any of these Federal laws prior to 1928 which prevented property owners from building up the local levees



during flood-times, in a flood fight, just as high as was physically possible (Neptune, R. 164; Simons, R. 178-179). That is how the Arkansas property owners forced the crevassing of the levees on the east, or Mississippi side, during the 1927 flood.

BUT, now, by law this it completely reversed. This is why in the very beginning of his description of the proposed new engineering plan General Jadwin recommended the reorganization of the Mississippi River Commission, and "*Federal control over structures within natural floodways*" (Doc. 90, Sec. 2). This is why legislation was necessary: "Prohibiting any obstruction not affirmatively authorized by Congress to the flood discharge capacity of the alluvial valley of the Mississippi River below Cape Girardeau and providing that *it shall not be lawful to build or commence the building of any levee or other structure in said alluvial valley or in any floodway provided therein unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War*" and further "Providing that *penalties and procedure applicable to violation of the laws for the protection and preservation of the navigable waters of the United States enacted in sections 12 and 17 of the river and harbor act of March 3, 1899, shall apply to violations of the above provisions of law.*" (Doc. 90, Sec. 149, R. 126).

This is why, pursuant to said essential recommendations, the Congress did, in the Flood Control Act of May 15, 1928, section 9 (R. 119), make the penal provisions of Title 33 U. S. C. A., Secs. 408 and 411 (R. 133-134), applicable to the Boeuf Floodway, and to the fuse plug levee at its head. Thus did Congress intentionally *destroy respondent's right of self-defense*, that is, her right to defend her

property against the flood menace of the Mississippi River. Senator Jones, Chairman of the Senate Commerce Committee in charge of the Bill, frankly declared: "Section 9 is *intended* to carry out the provisions of our general river and harbor legislation with reference to the creation of obstructions unless affirmatively authorized by Congress, *to provide penalty* for violation of it." (69 Cong. Rec., Part 5, p. 5487.

This "safety plug section" (Doc. 90, Sec. 16, R. 120), commonly called the fuse plug levee, is the very keystone and fundamental characteristic (Doc. 90, Sec. 3, R. 119) of the Jadwin Plan. The spillway site is the *sine qua non*, absolutely essential for the success of the Jadwin Plan, the present law (69 Cong. Rec., Part 1, p. 765). Without this weaker relief levee as a safety valve (Doc. 90, Sec. 134, Doc. 90, Sec. 98, R. 123), there would be no Jadwin Plan, and the Government has squandered its \$325,000,000 (Sec. 1 of 1928 Act), aimlessly, foolishly, futilely and without justification. This is why.

"The United States *MUST* have *control* over the Cypress Creek levee" (Doc. 90, Sec. 120, R. 124).

This is why every Chief of Engineers continues to insist: "The levee at the head of the floodway is, under the plan, *to be KEPT* at its prior height and condition *to form a fuse plug* for the relief of such extraordinary floods. All other levees are to be raised and strengthened so as to afford protection *except to the lands in the floodway* under such conditions" (Doc. 1, p. 3; Sec. 8, R. 142).

The Boeuf Floodway is as separate and independent a part of the single, comprehensive Jadwin Plan as the heart is a separate and independent organ of the human body.

"To insure that excess water will leave the main river, a *fuse plug* section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade. This *relatively weak section* will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below." Doc. 90, Sec. 118, R. 124.

"The Boeuf River bottom is *selected* for this diversion because it is the most suitably located to receive the water, is the most direct route, has the best width, and covers largely undeveloped swamp land." Doc. 90, Sec. 119, R. 124.

"In considering *the plan* for control of the Mississippi much study was given to providing a flexible feature such as *safety-valve spillways* over the levees to discharge water that might possibly come in excess of any predicted: *The fuse-plug levees decided upon* for the two lower sections of the river gave the flexibility desired and *made unnecessary additional safety valves* at this time." Doc. 90, Sec. 134.

"I further recommend that *legislation* be enacted: (a) *Prohibiting any obstruction* not affirmatively authorized by Congress to the flood discharge capacity of the alluvial valley of the Mississippi River below Cape Girardeau and providing that it shall not be lawful to build or commence the building of any levee or other structure in said alluvial valley, or in *any flood way* provided therein unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War. (b) Providing that the penalties and procedure applicable to violations of the laws for the protection and preservation of *the navigable waters*

of the United States, enacted in sections 12 and 17 of the river and harbor act of March 3, 1899, shall apply to violations of the above provision of law." Doc. 90, Sec. 149, R. 126.

Section 9 of the Flood Control Act of May 15, 1928, as recommended, does provide:

"The provisions of Sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and *rights* acquired or constructed under the provisions of this Act." Title 33, U. S. C. A., Sec. 702(i).

Section 14 of said Act of March 3, 1899, provides:

"It shall not be lawful for any person or persons to *take possession of, or make use of for any purpose, or build upon, alter, \* \* \** or in any manner whatever *impair the usefulness of any \* \* \* levee, \* \* \** or other work built by the United States, or \* \* \* used in the construction of such work *under the control of the United States*, in whole or in part, for the preservation and improvement of any of *its navigable waters, or to prevent floods, \* \* \** Provided, That the Secretary of War *may \* \* \** grant permission for the temporary occupation or use of any of the aforementioned public works *when in his judgment such occupation or use will not be injurious to the public interest.* (March 3, 1899, c. 425, Sec. 14, 30 Stat. 1152.)" Title 33 U. S. C. A., Sec. 408, p. 431.

The Federal Courts have already applied this criminal statute to levees built far inland from the main channel of the Mississippi River. *Houck v. United States*, 201 Fed. 862, 120 C. C. A. 200; *Cape Girardeau & T. B. T. R. Co. v. Jordan*, 201 Fed. 868, 120 C. C. A. 206.

fore floods on smaller rivers were of more than local significance, the frequent and devastating overflows of the Mississippi itself were attracting *national* attention which early expressed itself in the form of financial help. As early as 1824, Federal funds were allotted toward the control of floods on that river and, after 1881, these amounts were increased steadily until in 1928 Congress adopted a *comprehensive plan to be constructed at Government expense. At this time, some opponents of this plan suggested the abandonment of the valley to save money, but the Nation realized that the inhabitants of the Delta should not give up the fertile lands that have become the agricultural backbone of the Nation.* It has been stated that the losses from the flood of 1927 touched *the whole Nation* and subtracted something from the wage or income of every worker, whether he lived in a mill town in New England or tilled the soil in Kansas. *The project authorized by Congress in 1928, with subsequent modifications, is now known as the Army engineer plan. Thus, under the jurisdiction of the War Department, the comprehensive development of flood control at Federal expense was started and, in accordance with the will of Congress and the approval of the President, this activity has become Nation-wide under the same governmental agency that began such work.*" (Chief of Engineers, Maj. Gen. Julian L. Schley, March 22, 1939, Congressional Record this date, Appendix, p. 4415.)

This entire brief, and all the testimony in the present litigation, deals with the flood control works constructed directly by the United States, under "the supervision of the Chief of Engineers" as authorized and directed by the Flood Control Act of May 15, 1928.



The effect of this Act was first before this Court in the case of *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

1. The Boeuf Floodway is an *artificial* diversion deliberately and intentionally created by the Federal Government, the petitioner in this case. It is *designed* to flood respondent's property at times, and in a manner, and from a source, from which it was protected prior to the passage of the Flood Control Act of May 15, 1928. Loosely referring to the area as "a *natural* floodway" is not only beside the point, but entirely unfair, erroneous, misleading and confusing to the unwary.

The Jadwin Plan is the *deliberate design* of man. The human element of *choice* is reflected *passim* in the language of the Act and in the official description of the engineering plan. See *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

The Flood Control Act of May 15, 1928, adopted, enacted into law, and authorized the construction of, a man-made engineering plan which "*fundamentally differs from the present project*" (Doc. 90, Sec. 3, R. 119). "The present project" referred to was the existing plan of undertaking to control floods in the Mississippi River by "*levees only*" (Doc. 90, Secs. 76 and 80, R. 122). This plan of all local property owners exercising their respective rights of self-defense by building levees for the protection of their own property regardless of the effect of those levees on other property owners was the plan considered by the Court in such cases as *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041; *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363; *Hughes*

The fuse plug levee is to the Jadwin Plan what the vital valves are to the human heart. There can be neither life nor saving virtue in the Flood Control Plan of 1928 unless the fuse plug levee functions promptly and surely as intended.

Therefore the Flood Control Act of May 15, 1928, "established a *full degree of Federal Control over* the protection system, which prior to the 1928 Act had been exercised by local interests under the supervision of the Federal Government" (Neptune, R. 157). "*The local interests have no right to raise the fuse plug levee above the 1914 grade.* It cannot be done without destroying the effectiveness of the Jadwin Plan. One of the designated elements of the Jadwin Plan is to keep the fuse plug levee as such in order to preserve the elevations of the levee system above and below it" (Neptune, R. 277). "As to the claim that the local property owners could raise the fuse plug levee above the 1914 grade, from an engineering standpoint *the maintenance of the fuse plug levee at the 1914 grade and section is definitely and specifically an essential and vital feature of the plan* adopted by the Flood Control Act of May 15, 1928. *If this fuse plug should be raised by any authority, one of the essential vital features of the Jadwin Plan would be cancelled.* We would be back under the previous condition and history where, when river floods come down the river, the levee would break here one year and there another. All of the area now protected would be more or less under the same hazard" (Wonson, R. 281).

This fuse plug levee was completed to the then standard grade and section in 1921 by invitation of the United States, the present petitioner, and upon its assurance that if the local property owners would complete this line of levee by

closing the outlet or gap in the levee at the mouth of Cypress Creek, the property back of the levee would have complete protection against all future floods from the main channel of the Mississippi River (Simons, R. 173-174; Wonson, R. 171). Relying upon this assurance, the local property owners bonded their property to the extent of \$3,000,000 and completed this levee (R. 131-132, 151-152, 291-297), which held even during the unprecedented disastrous flood of 1927. This confident, assured, justified expectation on the part of property owners for speedy and ultimate protection against the flood waters of the Mississippi River equal to that enjoyed by other protected areas in the Middle Section of the alluvial valley of the river prevented former floodings of this property from seriously affecting market values. The District Court erred in refusing to adopt respondent's requested Finding of Fact No. 63 (a and b), (R. 315-316).

Now, the Flood Control Act of May 15, 1928, has changed all this. The petitioner, the United States, has taken over the control of this levee, respondent's only protection, and converted it into a "safety-valve" for the protection of the balance of the alluvial valley. Since May 15, 1928, and henceforth "**THE UNITED STATES MUST have CONTROL over the Cypress Creek levee and KEEP IT substantially at its present strength and present height**" (Doc. 90, Sec. 120, R. 124).

**THE LAW.** When it is demonstrated that the United States has taken over the complete control of the fuse plug levee, which is the only protection and defense afforded the respondent's property against the destructive flood waters from the main channel of the Mississippi River, a protection secured only by the respondent having joined other property owners in an investment of exceeding \$3.

times all the water that flows down the St. Lawrence River to the sea." "The Corps of Engineers, being no miracle workers, cannot find the means of taking 1,000,000 cubic feet of water out of the Mississippi River, five times the flow of the St. Lawrence River, and do it in any narrow fashion. We have to find the best means *and stay with it*" (Chief of Engineers General Markham, January 27, 1936, R. 145-146).

"Therefore, the only thing the United States is proposing is that instead of having a sporadic indefinable crevasse somewhere—and that is what we have always had in the past—we definitely put it down with prediction, and pay the flowage for that purpose, and pay nearly the real value of every foot that it traversed by that water in *that determined path*" (General Markham, January 27, 1936, R. 146, 147, 148).

In discussing the proposed Eudora Floodway before a Congressional Committee May 1, 1936, General Markham, then chief of engineers, accurately described the physical result of the fuse plug levee in the latitude of respondent's property in these words: "In this particular case we are taking these floodways and physically, *by the work of the United States*, directing these additional flood waters over particular property, and *that creates a Federal obligation*" (R. 149). "We are *physically, deliberately* putting additional flood waters down in a certain territory, and thus deliberately creating an obligation for the acquirement of those flowage rights" (R. 150).

The State of Arkansas, speaking through its constitutional voice, the General Assembly of the State, on April 13, 1934, declared that the United States had "*confiscated*"

property rights on the floor of the Boeuf Floodway (R. 152), and on March 6, 1935, made another legislative finding of fact that the petitioner in this case, the Government, "under its right of eminent domain *has taken* levees for the purpose of *diverting* waters over lands heretofore protected from flood waters," and "the taking of such lands and property has *destroyed values*" (R. 152-155). The State of Arkansas has consented to the exercise of these rights of eminent domain on the part of the United States in connection with its Flood Control Act "provided adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto" (R. 156).

"At the time the present suit was filed and since, additional destructive flood waters will pass over the (respondent) plaintiff's property by reason of diversion from the main channel of the Mississippi River, overtopping the fuse plug levee at gages somewhere around 59 feet on the Arkansas City gage as shown by our survey and profile of that low levee line." "If a flood crest in the Mississippi River exceeds the present height of the fuse plug levee at its weakest and lowest point the levee would be overtopped and would crevasse and would start to flood through the floodway and diversion. That would take place on this property and the head of the floodway with full crevasse effect. The release of a volume of water which has been held up against the levee some twenty feet deep on empty ground would result in destructive velocity with damage to the property in the head of the diversion section. Plaintiff's (respondent's) land is less than a mile from the fuse plug levee at the closest point. Her land is about 2½ miles from the fuse plug levee at Arkansas City." "When



## B. The LAW anent "Taking."

1. The ACT. We earnestly submit that the very clear and express language of the Act itself, standing alone and without reference to any other authority, is amply sufficient to fix legal liability in this case. Section 4 of the Act provides:

"Sec. 4. The United States *SHALL* provide flowage rights for additional destructive flood waters that *will* pass by reason of diversions from the main channel of the Mississippi River" (R. 119).

The Act makes no distinction, or differentiation of any kind whatever, between the four authorized and adopted diversions or floodways. The definite and express obligation is upon "*the United States*" to provide "flowage rights" in each.

One of the allegations of the Petition, and the unquestioned proof in the case, is that: "The waters that will flow into the Boeuf Floodway or diversion channel will ALL be diverted from the main channel of the Mississippi River at a place and in a manner which has never been true before" (R. 10).

The fuse plug levee of the Jadwin Plan, respondent's only protection from the flood waters of the main channel of the Mississippi River, held safely even during the unprecedented flood of 1927, and no "destructive flood waters" "*from the main channel of the Mississippi River*" passed over or through this section of the levee over respondent's property, or into the Boeuf Basin diversion, during the 1927 flood. Therefore, section 4 explicitly requires the petitioner United States to "provide flowage

rights" for *all* of the flood waters which the Flood Control Act of 1928 will now send over respondent's property. The language of the Act—"shall"—is mandatory.

There is no uncertainty whatever about the actual dedication of this floodway, or diversion channel, for public use in the protection of the balance of the alluvial valley of the Mississippi River (Doc. 90, Sec. 121, R. 124). The Congress expressly and carefully provides for all "additional destructive flood waters that *will pass* by reason of diversions" (Act Sec. 4, R. 119). As was suggested by Judge Martineau when overruling petitioner's demurrer below, it would be difficult for the Government to select language more clearly acknowledging liability. Appendix A.

The engineering plan (Doc. 90) treats the several floodways together, *the combination of them* producing the desired factor of safety. The Chief of Engineers states: "The water within the river channel does no damage whatever and it should be kept within the channel as long as possible. The excess *must* be spilled through *safety valves* when the volume exceeds the safe capacity of the river. *These safety valves* consist of one controlled spillway, several relief or fuse-plug levees at present levee grade and one levee of reduced height" (Doc. 90, Sec. 97, R. 123). There is no difference in principle between the legal rights of the property owners on the floor of each of these diversion channels below each of "these safety valves." The petitioner has admitted its liability to property owners in the other floodways. See *United States v. Hess*, (C.C.A. 8th) 70 Fed. (2d) 142; *United States v. Hess*, (C.C.A. 8th) 71 Fed. (2d) 78; *United States v. Yazoo & M. V. Ry. Co.*, 4 Fed. Supp. 366.

As late as February 27, 1934, the then head of the department having in actual charge the execution of the will of Congress, Chief of Engineers Maj. General Edward M. Markham, was assuring the Congress, and through Congress the American people including this respondent and the Federal Judiciary, that the United States did actually at that time have *full control of the fuse plug levee*, and would not hesitate to exercise that control. He then stated:

"The Boeuf Basin *has been put* in a very unfortunate situation since the levees below the Boeuf Basin were *designed* with the theory that *we will not permit beyond about 1,800,000 second-feet to pass the fuse plug*". (R. 141).

The same responsible Chief of Engineers was still later speaking *officially* for the petitioner United States on April 30, 1936, nearly two years after respondent's suit had been filed and while it was pending, when he said to Congress, with reference to Section 4 of the 1928 Act, and therefore necessarily urges upon this Court, the following:

"I think the confusion has to do with the words 'additional floodwaters.' In this particular case we are *taking* these floodwaters and *physically, by the work of the United States, directing these additional floodwaters over particular property, and that creates a Federal obligation.*" (R. 149.)

As a matter of current history, the Court may well take judicial notice of the fact that the petitioner United States, during the recent flood of 1937, *actually exercised* its right of complete control over these fuse plug or relief levees taken over by the Flood Control Act of May 15, 1928, by actually dynamiting the similar fuse plug levee at the head of the Birds Point-New Madrid Floodway (R. 264), as

well as by actually using the Bonnet Carre Floodway above New Orleans. Furthermore, the public press reports from Washington during the 1937 flood repeated General Markham's public assurances that *the fuse plug levee at the head of the Boeuf Floodway would be breached if necessary.*

This Court will not doubt for one moment that whenever it is necessary the Government will exercise its right to insure the use of the Boeuf Floodway as contemplated by the Flood Control Act of May 15, 1928, for the protection of the remainder of the alluvial valley of the Mississippi River. (Doc. 90, Sec. 121, R. 124).

On March 30, 1938, long after the trial in the District Court (R. 117), the Chief of Engineers still emphatically asserted to Congress the right and purpose of the Government to blow out the fuse-plug levee whenever deemed necessary for the protection of the other government levees. "It was left at its lower height *for that very purpose.*" "That was the original purpose as far back as the report of 1928, the Jadwin report." "That still remains with its original function." Genl. Schley, HEARINGS, House Committee on Flood Control, March 30 to April 19, 1938, at page 20.

The Committee reported to Congress that it was essential that the "*United States should have exclusive control to render flood-control system effective?*" (House Report No. 1072, 70th Congress, 1st Session, p. 30).

Since the passage of the Flood Control Act of May 15, 1928, the petitioner's legal right of control over the fuse plug levee at the head of the Boeuf Floodway has been, and is, *exclusive and complete.*

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## POINT V.

The physical facts accomplish a "TAKING" of respondent's private "*property*" for public use.

The District Court erred in its Conclusions of Law Nos. 1, 2 and 3, R. 368.

**A. The FACTS.** A study of the preceding Points leads irresistibly to the conclusion that respondent's private property has, in fact and in law, been taken for a public use by the petitioner within the meaning of the Fifth Amendment to the Constitution requiring payment of just compensation therefor to respondent.

In summary, the following unequivocal evidence in the record correctly reflects the actual physical facts.

"The physical facts that can be verified by any intelligent engineer are these: It is perfectly manifest that something like a million cubic feet of water will have to be handled in that valley" (Boeuf Floodway). "Over a million feet has to go out of there whether anybody likes it or not." "The Boeuf Basin has been put in a very unfortunate situation since the levees below the Boeuf Basin were designed with the theory that we will not permit beyond around about 1,800,000 second-feet to pass the fuse plug."

"The conception of the law or of Congress that we are working to is that there should remain in the system a *fuse plug* at Boeuf \* \* \*, and then that water will be taken out of the main stem to the West, as it stands."

"I can consent to nothing that increases substantially the flow of water below the fuse plug beyond 1,850,000 second-feet, because it courts disaster." "*We do not dare to*



*permit this water to pass that fuse plug*" (Chief of Engineers General Markham, February 27, 1934, Tr. 140-141).

"The Federal Land Bank of St. Louis will not make Land Bank loans in the Boeuf Basin Floodway \* \* \* because the Boeuf Basin floodway project is hanging over their heads and that affects loans seriously, affects their land values so that if we acquired land there we think we would find it very difficult to sell. People are afraid to go in there because they do not know what is going to happen" (Engineer Appraiser Kelly, February 27, 1934, Tr. 141).

"The capacity of the main leveed channel of the Mississippi River between the mouth of the Arkansas and the entrance to the Eudora Floodway is not sufficient at present to prevent a break in the levees between the Arkansas River and Eudora, nor is it possible at present to predict accurately where such a break would occur in a great flood, although experiments indicate that it would probably be *on the west side above Arkansas City*" (Mississippi River Commission, February 12, 1935, Doc. 1, p. 23, Sec. 22, R. 144).

"As to the contention of those who think that the lower valley can be protected within the levees of the main stream, I would state our conclusion that in order to take care of flood waters *there must be taken out of the river a million cubic feet a second*." "If there is any other answer having to do with protection of the lower valley, we do not know it. We cannot uncover it, and we cannot discover it." "I repeat that a million second-feet must be taken out of that river unless you are going to have more and more disasters." "That is pretty nearly six times all the water that flows over Niagara Falls. It is pretty nearly five

the fuse plug levee is overtopped the water in the river will stand 20 feet above the elevation of plaintiff's land less than a mile away" (Neptune, R. 160-161, 157-158). "Plaintiff's property has never been overflowed before by waters diverted from the main channel of the Mississippi River at the point where the fuse plug levee will now breach" (Neptune, R. 163).

The physical facts constituting the taking of respondent's property as alleged in her complaint are furthermore fully supported by Mr. Wonson (R. 167, 168, 171, and 173); and by Mr. Simons (R. 175, 176, 177 and 178); and by all of respondent's witnesses proving her damages (Hopson, R. 183, Baxter R. 191, Thompson R. 195, Parker R. 196, Clayton R. 200, Zellner R. 201, Neal R. 202, Courtney R. 204, T. A. Prewitt R. 204, Mann R. 205, B. C. Prewitt R. 207, Matthews R. 208, and Zebold R. 209).

These *physical facts* are not disputed by any witness. Only immaterial theoretical opinions and speculative prophecies are debated.

The petitioner's own chief expert witness Mathes testified: "Immediately following the passage of the Flood Control Act of 1928, work was begun on the Jadwin Plan as one, unified, comprehensive project for the flood control of the alluvial valley of the Mississippi River, funds being available at the time; and the work has proceeded practically without cessation since that time" (R. 244). "The construction work done by the United States Government under the Flood Control Act of May 15, 1928, now prevents the Mississippi River from using that large natural flood plane area east of the river in the State of Mississippi" (R. 251). "If the fuse plug levee is left as it is, a potential

*floodway is still there with a possibility of its use every season under the present plan.*” “The Flood Control Act of June 15, 1936, the Overton Act, authorizing the Markham Plan, leaves this fuse plug levee along the main channel of the river at the 1914 grade just as it is under the Jadwin Plan of the 1928 Act. It is not to be raised. . . .

When the water reaches a stage of 60.5, the fuse plug levee is intended to be overtopped and to crevasse under either plan. *The plaintiff's land is in the floodway under either plan, and it doesn't make any difference which is used, and would be by the same fuse plug levee*” (R. 246). “The Jadwin Plan as adopted by the Flood Control Act of 1928 has not yet been actually, physically changed. . . . The only plan under actual construction is that authorized by the Flood Control Act of May 15, 1928. *That is the actual, physical plan which is on the ground*” (R. 247). “Plaintiff's property is now in one of these particular floodways, at the most critical point of the River just below the mouth of the Arkansas. . . . The plaintiff's property has been on the floor of that floodway, very near its head, since the passage of the Flood Control Act of May 15, 1928” (Mathes R. 250).

“The plaintiff's property has been definitely subjected to a different flood hazard from that to which it was subjected at any time prior to the construction work done by the United States pursuant to the provisions of the Flood Control Act of May 15, 1928” (Neptune, R. 159).

“The construction work done by the United States pursuant to the provisions of the Flood Control Act of May 15, 1928, has created a different degree of flood hazard or menace to plaintiff's property in that previously her property had more or less of an even break with all the other prop-

erty in the alluvial valley. Crevasses along the river might be at various places. Under the present plan and law, the location of the levee failure in the middle section of the river has been *predetermined at the fuse plug* whenever the floods are sufficient to cause the fuse plug to operate" (Wonson, R. 168). "The effect of construction work done under the Flood Control Act of May 15, 1928, has subjected plaintiff's property to a *different and increased* flood hazard; to more depth of water and a greater velocity of flow on account of the close proximity of this property to the fuse plug levee" (Simons, R. 177).

These physical facts cannot be truthfully controverted. They make a constitutional "taking" of respondent's property, requiring ultimate judgment for respondent in this action.

*The Project Flood.* Considerable confusion exists as to the meaning of the phrase "the project flood" designed to be successfully controlled by the Jadwin Plan. It is variously described as follows: "The maximum flood predicted as possible" (Doc. 90, Sec. 2); five feet higher at Arkansas City on the fuse plug levee than the 1927 flood would have reached on the gage had it been confined (Doc. 90, Sec. 117, R. 123); "the greatest predicted possible excess water over and above the capacity of the leveed river below" (Doc. 90, Sec. 118, R. 124); "allowing for the escape of waters in the *greatest floods* out of the main river through a designated floodway" (Doc. 1, Sec. 8, R. 142); "a stage of about 74½ feet at Arkansas City" (14 feet above the present fuse plug levee) (Doc. 1, p. 18, R. 143); "400,000 more second-feet than went down the river in 1927" (General Markham, R. 150); "the maximum probable flood" (Doc. 1, p. 18, Sec. 7, R. 143); "the greatest

flood predicted as possible" and "all water predicted as possible" (Doc. 90, Sec. 99, R. 123),—which could very well exceed 4,399,000 cubic second-feet at the fuse plug levee (Neptune, R. 162).

"The 1928 Act contemplates a flood 25% to 30% in excess of the estimated 1927 flood, called the project flood, which would necessitate the escape of *more* than 1,000,000 cubic second-feet of water through the fuse plug levee down the Bœuf Floodway" (Neptune, R. 161-162; Wonson, R. 170). "The project flood' contemplated by the Flood Control Act of May 15, 1928, is not the greatest possible maximum flood that can come down the river, and does not purport to be" (Wonson, R. 171).

The 1927 flood at the fuse plug levee is estimated as having been a volume of only 2,460,000 cubic second-feet (Clemens, R. 261). The 1937 flood was not more than two-thirds of the estimated project flood (R. 164). It came almost entirely out of the Ohio River, while the upper Mississippi River and the Arkansas and White Rivers contributed substantially nothing to the flood (Carter, R. 284; Clemens, R. 263; Neptune, R. 276).

*Former Estimates.* These estimates of the engineers in the past have been consistently erroneous by *under estimation*. Recent floods are repeatedly exceeding all former estimates (Doc. 90, Sec. 96, R. 122; Doc. 798, p. 2, R. 137; Doc. 798, p. 47, R. 139; General Markham, May 1, 1936, R. 150).



2. *There can be no possible doubt that the CONGRESS did in fact contemplate and INTEND LIABILITY.*

Senator Jones, Chairman of the Senate Commerce Committee which conducted the Hearings, immediately before the passage of the bill by the Senate unanimously, said: "We have provision in the bill for condemnation of right-of-way, *flowage rights* and so on. *We feel that under the constitutional provision no private property can be taken for public use without compensation.* We could not avoid that if we desired to do so. \* \* \* If we sought to pass legislation authorizing the taking of private property without compensation, the courts would not uphold such a provision" (69 Cong. Rec., Part 5, p. 5485).

Congressman Reid, Chairman of the House Flood Control Committee in charge of the bill in the House, in explaining the bill in its present form, speaking on the "conference report," immediately before the conference report was agreed to, declared: "*This is the first time that any right has ever been recognized on the part of the individual owner against the Government for any flood control damages.* I think it (section 4 of the Flood Control Act) *creates a right*, and I presume every right in court follows the creation of that right" (69 Cong. Rec., Part 8, p. 8123).

A careful reading of all of the debates in Congress during the passage of this Flood Control Act will disclose that *not a single member of the Congress took the position that the owners of property constituting the floor of the designated floodways were not entitled to compensation for their sacrifice.* It was conceded by all that someone had to pay for the Government's right to flood or overflow property in these artificially created diversion channels. See Appendix B.

The Congress advisedly, deliberately, intentionally and expressly accepted NATIONAL RESPONSIBILITY, exercising EXCLUSIVE NATIONAL CONTROL, assuming complete GOVERNMENT LIABILITY, thus by legislation reversing the rule of former judicial decisions, rendering prior judicial precedents inapposite, nugatory and obsolete.

Republican Party Platform, 69 Cong. Rec., Part 2, p. 1730; also 69 Cong. Rec., Part 3, p. 3465; Democratic Party Platform, 69 Cong. Rec., Part 2, p. 1730; also 69 Cong. Rec., Part 3, p. 3465; President CALVIN COOLIDGE to Congress, 69 Cong. Rec., Part 7, p. 7126, House Report No. 1072, 70th Cong., 1st Session, p. 1; Senator RANDELL, (La.) 69 Cong. Rec., Part 1, pp. 938-939; Senator HAWES, (Mo.) 69 Cong. Rec., Part 4, pp. 4395-4396; Congressman REID, (Ill.) (Chairman House Flood Control Committee), 69 Cong. Rec., Part 5, p. 5645; Senator CARAWAY, (Ark.) 69 Cong. Rec., Part 4, p. 3915; Congressman SWING, (Calif.) 69 Cong. Rec., Part 6, p. 6717; Congressman MARTIN, (La.) 69 Cong. Rec., Part 6, pp. 6724, 6726; Congressman O'CONNOR, (N. Y.) 69 Cong. Rec., Part 6, p. 6782; Congressman BLACK, (N. Y.) 69 Cong. Rec., Part 7, p. 7111; Senator REED, (Mo.) 69 Cong. Rec., Part 5, pp. 5294, 5295, 5296; Congressman SWANK, (Okla.) 69 Cong. Rec., Part 7, p. 7119; Senator SACKETT, (Ky.) 69 Cong. Rec., Part 1, p. 773; Congressman HULL, (Ill.) 69 Cong. Rec., Part 2, pp. 2261-2263; Congressman COLLIER, (Miss.) 69 Cong. Rec., Part 2, p. 1731; Congressman QUIN, (Miss.) 69 Cong. Rec., Part 6, p. 6709; Congressman KOPP, (Iowa) 69 Cong. Rec., Part 6, pp. 6709-6710; Congressman NELSON, (Mo.) 69 Cong. Rec., Part 6, p. 6669; Congressman JOHNSON, (Texas) 69 Cong. Rec., Part 5, p. 5334; Congressman REID, (Ill.) 69 Cong. Rec., Part 5, pp. 5608,

So agreed they ALL. Congressman WILSON, (La.) 69 Cong. Rec., Part 8, pp. 8210, 8211; Congressman O'CONNOR, (La.) 69 Cong. Rec., Part 1, p. 765; Congressman SWANK, (Okla.) 69 Cong. Rec., Part 7, p. 7119; Congressman HULL, (Ill.) 69 Cong. Rec., Part 2, p. 2263, and 69 Cong. Rec., Part 6, p. 6718; Congressman FREAR, (Wis.) 69 Cong. Rec., Part 8, p. 8120 and 69 Cong. Rec., Part 6, p. 6779, and 69 Cong. Rec., Part 7, p. 7000; Congressman LaGUARDIA, (N. Y.) 69 Cong. Rec., Part 7, p. 7002; Congressman REID, (Ill.) 69 Cong. Rec., Part 5, pp. 5613 and 5649, Cong. Rec., Part 6, p. 6791, 6792 and 6795, and 69 Cong. Rec., Part 7, p. 7106 and p. 7111; Congressman MORROW, (N. Mex.) 69 Cong. Rec., Part 5, p. 5321; Congressman SWING, (Calif.) 69 Cong. Rec., Part 6, p. 6717; Congressman OOX, (Ga.) 69 Cong. Rec., Part 7, p. 7021; Congressman BLACK, (N. Y.) 69 Cong. Rec., Part 7, p. 7111; Congressman O'CONNOR, (N. Y.) 69 Cong. Rec., Part 6, p. 6782; Congressman DRIVER, (Ark.) 69 Cong. Rec., Part 6, p. 6783, and p. 6786; Congressman KOPP, (Iowa) 69 Cong. Rec., Part 6, p. 6712; Congressman MADDEN, (Ill.) 69 Cong. Rec., Part 7, p. 7003 and p. 7096; Congressman DEMPSEY, (Ill.) 69 Cong. Rec., Part 7, p. 7108; Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 4, p. 4139, and 69 Cong. Rec., Part 6, p. 6652; Governor JOHN E. MARTINEAU, late United States District Judge in Arkansas, HEARINGS, House Committee on Flood Control, January 5-17, 1928, Part 4, p. 2500; and Congressman JACOBSTEIN, (N. Y.) 69 Cong. Rec., Part 8, p. 8584.

Congressman DRIVER, (Ark.) speaking as an active member of the Flood Control Committee, said:

"In the language of the law the duty of the United States is to 'provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River.' This particular language is employed to differentiate the natural reservoirs and streams which are now charged with the burden of *natural drainage—that is, such rivers, bayous, and depressions through which usually pass the waters falling and are drained through the same*, as distinguished from the areas which will be charged with waters not accustomed to flow over the land through natural drainage." 69 Cong. Rec., Part 10, p. 10793.

During the passage of the act, an effort was made to limit the recovery of property owners in the floodway strictly to the constitutional limitation, and Congressman TILSON; (Conn.) offered the following amendment as a substitute for the language in section 4 as we now find it, to-wit:

"Any property taken by the United States for the purpose of carrying out the terms of this act for which compensation is required by the Constitution of the United States shall be paid for by the United States." 69 Cong. Rec., Part 7, p. 7104.

In urging the adoption of this amendment, Congressman TILSON stated:

"We come now to the question—and it is the crux of the whole question—who shall furnish the land for these floodways. . . ."

"Why should we not stand on the constitutional right which every citizen has to receive just compensation if his property is taken for a public use? In the amendment that

I have offered it is stated, in effect, that in case private property is taken in the constitutional sense, *the United States assumes the responsibility for it*. How can anyone suffer if his constitutional rights are preserved and these are buttressed by an assumption of the obligation by the United States in case his property is taken within the meaning of the Constitution? \* \* \*

"The amendment that I have offered gives everyone ample protection, as he is protected under the Constitution, and fixes the obligation of the United States for such damage as may accrue under the Constitution. Why should we not be satisfied with this? Why is it not enough to protect any citizen of the United States? I think it is, and that when we go beyond this and propose to buy lands, easements, or flowage rights in advance we enter upon dangerous ground." 69 Cong. Rec., Part 7, p. 7105.

But the Congress promptly and overwhelmingly rejected this amendment (69 Cong. Rec., Part 7, p. 7111); Chairman REID, speaking for the majority as follows:

"Mr. Chairman, I told you the first day that we agreed to everything that the President's representatives said they wanted *except turning destructive flood waters down upon innocent people*, and I stand today reiterating that same proposition. The only relief provided by the amendment that the gentleman from Connecticut (Mr. TILSON) proposes would give to a man after his property has been destroyed by the destructive flood, or probably some of his kin have been drowned, would be to say to him, 'You go to the United States courts, start a lawsuit, and at the end of 5 or 10 years, perhaps, you will be thrown out, and then you will be able to come to Congress and be sent to the Court of Claims, and after fussing around there for a year or two



you will be forgotten,' If that is the kind of Government we have, then we better have a change in the form if not in the administration of it. You do not know what you do when you try to turn this water on the people and leave them to their constitutional rights. *At the present time these are not natural floodways.*" 69 Cong. Rec., Part 7, pp. 7105, 7106.

"*So the amendment was rejected.*" 69 Cong. Rec., Part 7, pp. 7111-7112.

"The Jadwin plan provided that floodways or diversions like the *Boeuf floodway* of more than 1,000,000 acres shall be furnished to the Federal Government by the State. *The committee bill requires that the Federal Government shall purchase, or secure by condemnation this floodway* . . . . Congressman FREAR, in presenting to the House the committee minority report, 69 Cong. Rec., Part 6, p. 5879.

In replying to Congressman FREAR, Chairman REID, speaking for the majority, said:

"We have met the representatives of the President, and we have agreed on everything they asked, and I am going to present amendments embodying everything the President asked, with the single exception of agreeing to one thing—and *I will never propose an amendment or support any section of this bill which will permit the turning down on innocent people in these so-called floodways of a torrent three times that of Niagara Falls without first acquiring the rights-of-way or the flowage rights; and there I stand, and that is the only difference between us today.*

"The last speaker is in error. *The Boeuf floodway at the present time is not a floodway.* . . . These lands are

protected, the same as the lands on the Mississippi River, by the levees on the Mississippi River; and unless the Mississippi levees break, you will have no floods in the Boeuf floodway; \* \* \* but they are trying to give you the impression that we are trying to make the Government acquire land that is now a floodway. *This is not true, and no one claims it is true.* \* \* \*

"Mr. LaGUARDIA. What does the gentleman substitute for section 4?

"Mr. REID of Illinois. *That the Government shall be liable where it diverts the water from the main channel.*" 69 Cong. Rec., Part 7, pp. 7000-7001.

"\* \* \* the provisions in section 4 of the bill were written, I dare say, for the purpose \* \* \* of taking the property out of the class that is mentioned in the cases of Jackson and Hume (Hughes) and others, where the property in question was clearly and admittedly destroyed under circumstances where the owner had no right of relief." Congressman COX, (Ga.) 69 Cong. Rec., Part 6, p. 6720.

"I believe it is generally admitted by all that where property is taken to be used as a floodway compensation should be made for whatever interest in that property may necessarily be dedicated to that purpose." Congressman WILSON, (La.) 69 Cong. Rec., Part 6, p. 6776.

"Mr. Speaker, the conference report on S. 3740, commonly known as the Jones-Reid flood control bill, is pending before the Senate and the House. \* \* \* *The bill contemplates that the Government will provide the flowage rights through floodways, diversions and spillways, and the rights-of-way for levees along the diversions.* \* \* \*

*"The compensation for any property taken is determined in the courts of the United States. Commissioners to determine values are appointed only by the Federal court. . . .*

*"The President recommended a local contribution of 20 per cent. . . . The President, however, made it known to Congress that he had receded from this position. He is willing to eliminate the local contribution of 20 per cent. . . .*

*"Mr. Madden stated, substantially, that the President desired the United States to furnish the floor, to use his language, for diversions.*

*" . . . the Government is to provide flowage rights . . . for the diversion at Cypress Creek through the Boeuf Basin, hereinafter called the Boeuf diversion; . . . The administration was represented as being favorable to being responsible for the flowage rights. The Jadwin plan is accordingly modified in the bill to add the estimated costs of the flowage rights through the spillways, floodways, and diversions mentioned, and to provide that the United States shall furnish the rights-of-way for levees along the diversions. . . . Their cost should be a common charge against the Government. Mr. Madden, manifesting a fine spirit of fairness and justice in treating this great national problem, conceded that the Government should be responsible for the flowage rights." . . .*

*"Boeuf Diversion. . . . The Jadwin plan did not contemplate that the United States should provide the flowage rights. . . . The Government should pay for these flowage rights. The United States permitted and consented to the construction of a levee across the mouth of Cypress Creek. There was a natural outlet, and the Gov-*

5616; Congressman RAGON, (Ark.) 69 Cong. Rec., Part 5, p. 5125; Congressman LOZIER, (Mo.) 69 Cong. Rec., Part 5, p. 5464; Congressman DAVENPORT, (N. Y.) 69 Cong. Rec., Part 6, p. 6715; Congressman DRIVER, (Ark.) 69 Cong. Rec., Part 6, p. 6787; Congressman GUYER, (Kan.) 69 Cong. Rec., Part 6, p. 6774; Congressman SINCLAIR, (N. Dak.) 69 Cong. Rec., Part 6, p. 6775; Congressman (Chairman) REID, (Ill.) 69 Cong. Rec., Part 6, p. 6796; Congressman PRALL, (N. Y.) 69 Cong. Rec., Part 6, p. 6729; Congressman SPEARING, (La.) 69 Cong. Rec., Part 7, pp. 7027-7028; Congressman GREEN, (Fla.) 69 Cong. Rec., Part 7, p. 7121; Congressman LOWREY, (La.) 69 Cong. Rec., Part 7, p. 7125; Congressman HERSEY, 69 Cong. Rec., Part 7, p. 7126; Congressman CARTWRIGHT, (Okla.) 69 Cong. Rec., Part 7, p. 7127; Congressman REED, (Ark.) 69 Cong. Rec., Part 7, p. 7130; Senator ASHURST, (Ariz.) 69 Cong. Rec., Part 5, p. 5481; Senator JONES, (Wash.) 69 Cong. Rec., Part 5, p. 5483; Senator RANDELL, (La.) 69 Cong. Rec., Part 5, p. 5492; Senator STEPHENS, (Miss.) 69 Cong. Rec., Part 5, p. 5493; Senator HEFLIN, (Ala.) 69 Cong. Rec., Part 5, p. 5493; Senator MAYFIELD, 69 Cong. Rec., Part 5, p. 5294; Senator SIMMONS, (N. C.) 69 Cong. Rec., Part 5, p. 5297; Congressman FREAR, (Wis.) 69 Cong. Rec., Part 6, pp. 5869, 6655; Congressman COCHRAN, (Mo.) 69 Cong. Rec., Part 6, p. 5998; Congressman ASWELL, (La.) 69 Cong. Rec., Part 6, p. 6111; Congressman HOWARD, (Okla.) 69 Cong. Rec., Part 6, p. 6311; Congressman WILSON, (La.) 69 Cong. Rec., Part 6, p. 6644; Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 6, pp. 6649-6650; Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 4, pp. 4134, 4141, 4138; Congressman FULLBRIGHT, (Mo.)



69 Cong. Rec., Part 3, pp. 3400-3401; Congressman HASTINGS, (Okla.) 69 Cong. Rec., Part 7, p. 7012; Senator McKELLAR, (Tenn.) 69 Cong. Rec., Part 5, p. 5495. See Appendix B.

LAW. "*The intention of the lawmaker is the law.*"

*Hawaii v. Mankichi*, 190 U. S. 197, 212, 23 S. Ct. 787, 47 L. ed. 1016, at p. 1021.

"A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter. *People v. Utica Ins. Co.*, 15 Johns., N. Y., 358, 381, 8 Am. Dec. 243; *Territory of Hawaii v. Mankichi*, 190 U. S. 197, 212, 23 S. Ct. 787, 47 L. ed. 1016; *Barrett v. Van Telt*, 268 U. S. 85, 90, 91, 45 S. Ct. 437, 69 L. ed. 857."

*Thompson v. Terminal Shares*, decided May 18, 1939, (C.C.A. 8th), 104 F. 2d (Advance Sheets) I, at p. 8.

That the Congress, and the Congress alone, is authorized to speak for the United States, and shape its policies, is beyond question. When Congress deliberately assumes contractual liability on behalf of the Government no Court has the moral right to deny that liability.

Congress intended by the language of section 4 of the Flood Control Act to require payment by the United States of compensation for the servitude taken, viz., the "flowage rights." For this *right* to artificially overflow or flood their property—regardless of when, or how often used, if ever—the Government purposed, and expressly provided, that the property owners in the floodway should be paid. Congress desired to avoid any possible controversy as to whether or not such owners of property would be adequately protected by the provisions of the Fifth Amendment of the Constitution. Congress intended that "just compensation" for the "property" "taken" should be liberally



construed to cover all *damages* sustained by the property owners; notwithstanding, under former judicial decisions, the United States might not have been liable for such *damages*.

No informed mind can possibly doubt these facts after reading the congressional discussion preceding the passage of the Act. See Appendix B.

Judge Martineau, in overruling petitioner's demurrer in the instant case in the District Court, declared:

*"I have no doubt in my mind that, under the Flood Control Act whatever damage can be established, can be recovered in a proper suit against the Government. The fact, that the plan itself contemplated that these lands should be used as a flowage way is sufficient to show that the damage comes from their actual taking for public use, . . . I am sure that was the intention, and the opinion held by almost everybody in the Congress which passed the bill. Nobody wants to take private property and use it for flood control purposes without the proper compensation being made. . . . everything in the bill is intended to protect those who were damaged . . . If that is not accomplished by the wording of the bill it is because those who were interested in its passage were mistaken as to the meaning of the language placed in it. I am sure that was the meaning intended at the time of its passage."* See Appendix A.

So agreed every member of the Congress who spoke on the Bill.

In its very complete report on "Flood Control in the Mississippi Valley" (House Report No. 1072, 70th Con-

gress) the Committee on Flood Control reported its findings, and deliberate judgment, to the Congress as follows:

"Thirty States pour their flood waters down on Louisiana, and yet, after having erected levees sufficient to take care of the natural flood waters, it is forced to contribute large sums to take care of the floods produced by artificial drainage caused by the prosperity of other States. *The one causing the damage should pay.* It is our boast that there is no wrong without a remedy. *This is a vain boast unless the Federal Government does its whole duty to the people of the lower Mississippi Valley.* Fair play and common justice would require that, . . ." (House Report No. 1072, p. 15).

Senator HAWES, (Mo.) stated to the Congress:

"The President recognized this great change in policy and has opposed it; but I understand that now *he has finally agreed that the people of the United States shall pay practically all the cost of this work, including sixty or seventy millions to landholders for lands and rights.* In short, the President has surrendered." 69 Cong. Rec., Part 8, p. 8192.

On the same day, Senator CARAWAY, (Ark.) had just stated to the Senate:

"The only measure of recovery that one who owns property there that is taken, or partly taken, for public use, is the difference between the value of the property before and after the improvement is made. *You can not take that right from the owner, because the Constitution guarantees it to him,* and the word 'additional' does not add to or take from the liability of the Government, or the right of the citizen whose property is appropriated." 69 Cong. Rec., Part 8, p. 8190.

ernment closed it. At the time, Cypress Creek was closed it was thought that levees only would provide complete flood control. *The local interests relied upon the judgment of the commission.* They have spent millions of dollars in construction works and in draining and improving lands in the Boeuf area. . . .

"The conference committee has materially amended the section as it passed the Senate and as it passed the House. The Government is only liable for flowage rights. The provision only includes a declaration that *the United States will furnish the flowage rights.* If the United States is to furnish the floor for the diversions, then the conference committee has met the views of the President. *Flowage rights mean nothing more nor less than the floor for the diversions.* . . .

"The Government will respond in damages if the flowage rights are not acquired over railways and highways. The view of the administration has been met in this regard." Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 7, pp. 7886, 7887, 7888, 7889.

"In this comprehensive plan you have certain floodways and spillways definitely mapped out. Now, any property in that spillway or floodway path would be entitled to just compensation under the Tilson amendment and under existing law. . . . So that the difficulty suggested by the gentleman from Illinois (Mr. REID) as to leaving these people with an indefinite remedy and undecided as to what tribunal they should resort to is fully decided in the case of the *Great Falls Manufacturing Co.*, reported in One Hundred and twelfth United States. (U. S. v. *Great Falls Mfg. Co.*, 112 U. S. 645, 55 S. Ct. 306; 28 L. ed. 846.) *They can*

*treat it as a contract, and go directly to the Court of Claims if they so desire. . . .*

" . . . In the case cited by the gentleman from Illinois, (as *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041; *Jackson v. U. S.*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363; *Hughes v. U. S.*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374; *Bedford v. U. S.*, 192 U. S. 217, 48 L. ed. 414), I repeat that the damage was *incidental and unexpected*. It was not within the contemplation of the project itself, and I say for the third or fourth time that in the case of *the bill we are now considering you have a certain definite and specific proposition mapped out in a comprehensive flood relief plan, and that comes clearly within all of the decisions I have cited*." Congressman LA-GUARDIA, (N. Y.) 69 Cong. Rec., Part 7, pp. 7109-7110.

These "oracles indubitably clear and infallibly certain" proclaim to the world that if respondent is denied recovery in her present suit the will of the Congress of the United States will be violently thwarted. We are confident this Court will not knowingly contravene these solemn official assurances of the Government—the law of the land. "The intention of the lawmaker is the law." *Hawaii v. Mankichi, supra*.

Re: "ANCIENT FLOODWAY." As its theme song in this case, petitioner constantly harps in monotonous monotone on its dreary, iconoclastic *theory* that all the Boeuf Floodway, including respondent's property, was once the ancient flood-bed of the river, and anyone foolish enough to live in the high-water bed of the Mississippi River *ought* to be drowned. It had the district court erroneously find: "The proof shows that the Boeuf Basin has always been a floodway" (No. 19, R. 356; Error No. 210, R. 140).



Congress also considered, discussed and *rejected* this *theory* so inconsistent with the actual facts. "It is merely an ignorant assumption unsupported by facts." Senator HAWES, 69 Cong. Rec., Part 4, p. 4396; Chairman REID, (Ill.) 69 Cong. Rec., Part 6, pp. 6790-6792 and 69 Cong. Rec., Part 5, p. 5616; Senator RANSDELL, (La.) 69 Cong. Rec., Part 1, p. 938 and 69 Cong. Rec., Part 1, p. 774; Congressman COLLIER, (Miss.) 69 Cong. Rec., Part 2, p. 1729; Senator CARAWAY, (Ark.) 69 Cong. Rec., Part 8, pp. 8190-8191; Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 6, p. 6652. Some faint idea of the industrial development of this vast fertile area may be gathered from examination of the enormous losses sustained which gave the Congress such national concern. See 69 Cong. Rec., Part 4, p. 4397 and 69 Cong. Rec., Part 7, p. 7131, especially indicating the development and civilization of Desha County, Arkansas.

The most conclusive refutation of this unfair, prejudicial, specious argument that respondent's property must be regarded as lying in the natural high-water bed of the river and therefore subject to the Government's use at pleasure without liability, is found in the decision of this Supreme Court of the United States to the contrary. See *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041, at p. 1049, quoted by Congressman Cox as follows:

• "Indeed; from the face of the bill, it is apparent that the rights relied upon were assumed to exist upon the *theory* that the valley through which the river travels, in all its length and vast expanse, with its great population, its farms, its villages, its towns, its cities, its schools, its



colleges, its universities, its manufactories, its network of railroads, some of them transcontinental, are virtually to be considered from a legal point of view as constituting *merely the high-water bed of the river*, and therefore, subject, without any power to protect, to be submitted to the destruction resulting from the overflow by the river of its natural banks. • • •

“In fact, the nature of the assumption upon which the argument rests is shown by the contention that the building of the levees under the circumstances disclosed was a work not of preservation but of *reclamation*—that is, a work not to keep the water within the bed of the river for the purpose of preventing destruction to the valley lying beyond its bed and banks, but to *reclaim* all the vast area of the valley from the peril to which it was subjected by being situated in *the high-water bed of the river*. If it were necessary to say anything more to demonstrate the *unsoundness of this view*, it would suffice to point out that the *assumption is wholly irreconcilable with the settlement and development of the valley of the river*; that it is at war with the action of all the State Governments having authority over the territory, and is a complete denial of the legislative reasons which necessarily were involved in the action of Congress creating the Mississippi River Commission and appropriating millions of dollars to improve the river by building levees along the banks in order to confine the waters of the river *within its natural banks*, and by increasing the volume of water to improve the navigable capacity of the river.’”

(*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041, at p. 1047.) Congressman COX, (Ga.) 69 Cong. Rec., Part 6, p. 6720.

Arkansas City, the county seat of Desha County, lying immediately in front of respondent's property, is one of the oldest river settlements in the State. It was a thriving business community when Mark Twain wrote his "Life on the Mississippi River." Churches, school houses, courts of justice, railroads, banks, sawmills, gins, telephone and telegraph lines, and business houses for commerce of every kind and character, and all the other material indicia of the blessings of modern civilization (R. 183, *et seq.*), such as have existed in and around Arkansas City for generations, are not found in the unreclaimed flood-beds of rivers. If respondent's property and Arkansas City were ever the ancient and natural flood-bed of the Mississippi River that was ancient history when the Flood Control Act of May 15, 1928, was passed. The Congress was correctly advised by Chairman Reid that: "*The Boeuf floodway at the present time is not a floodway*" (69 Cong. Rec., P. 7, at p. 7000). See also Appendix B, III. Cultivated land like respondent's, in that vicinity, was enjoying a market value of from \$100 to \$125 per acre immediately before the legal creation of Boeuf Floodway (R. 185). No witness disputed that actual fact.

"The bank of the river was where it was found, and did not extend over a vast and imaginary area." *Cubbins v. Mississippi River Commission, supra*, 60 L. ed., at p. 1049.

Therefore this court will not likely be misled by the absonant argument that recovery must be denied respondent because forsooth her property had been repeatedly inundated by Arkansas River floods prior to the 1928 Act, and was in times long since past the ancient flood bed of a river. So indeed was most of the city of Washington.

3. **KINCAID v. UNITED STATES**, 35 Fed. (2d) 235, 37 Fed. (2d) 602, and 49 Fed. (2d) 768, was expressly pleaded by respondent (R. 11-12) because these carefully considered opinions of the lower Court in the Kincaid case led the Supreme Court of the United States to say:

"We may assume that, as charged, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's land *constitutes a taking* of it—as soon as the Government begins to carry out the project authorized. (Cases cited.) If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. (Cases cited.)" *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

(a) We first urge that the Supreme Court of the United States would not have carelessly indulged in this assumption of law by way of *obiter dictum* in a test case of such great importance, involving the property right of thousands of citizens of the United States and unusually large amounts of Government money, unless the Court had given most careful consideration to its solemn pronouncement. The able judges of this august body of *last resort* are not accustomed to talk loosely. This decision is a plain invitation to respondent in the case at bar to institute this identical action. *Deliberate dictum by the Supreme Court is controlling*. Title 28 U. S. C. A., Sec. 71, Note 8, p. 20.

(b) To support its assumption, the Supreme Court cites the cases of *United States v. Lynah*, 188 U. S. 445, 469, 23 S. Ct. 349, 47 L. ed. 539; *United States v. Cress*, 243

U. S. 316, 328, 37 S. Ct. 380, 61 L. ed. 746, 753; *Peabody v. United States*, 231 U. S. 530, 538, 34 S. Ct. 159, 58 L. ed. 351, 353; *Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U. S. 1, 39 S. Ct. 399, 63 L. ed. 809; 260 U. S. 327, 329, 43 S. Ct. 135, 67 L. ed. 287, 289. A careful study of these decisions makes it clear that the Supreme Court was intending to recognize in its decision in the *Kincaid* case the legal principles upon which respondent herein now relies.

(c) This Court will further notice that the author of the syllabi understood that the case definitely upheld the position of the respondent now before this Court. While possibly not controlling, we understand that the syllabi of a decision of the United States Supreme Court are very carefully composed, and usually have the approval of the Court. In syllabus 2, the author states that the Court squarely decided that:

"One whose lands *may* be subjected to OCCASIONAL flooding as a direct consequence of the construction by the government of a floodway to relieve the channel of a river in times of high water *may*, AS SOON AS WORK ON THE PROJECT IS BEGUN, *maintain* an action at law under the Tucker Act against the government as upon an implied contract, for such compensation as might have been awarded had condemnation proceedings been instituted." 76 L. ed. 638. Because

"1. It may justifiably be assumed that the adoption by Congress of a plan of river flood control which involves an *intentional*, additional, *occasional* flooding of certain lands *constitutes a taking thereof* as soon as the government begins to carry out the project authorized." 76 L. ed. 637-638.

(d) Furthermore, as a matter of fact, the Supreme Court *did definitely determine* in *Hurley v. Kincaid, supra*, that Kincaid *did have* "a plain, adequate and complete remedy at law." This is the decision itself—*not obiter dictum*. Following its carefully considered opinion, the Court actually decides the case (and holds) in the following language:

"*AS the complainant HAS a plain, adequate and complete remedy at law*, the judgment is reversed with direction to dismiss the bill without prejudice." 76 L. ed., at p. 643.

(e) Furthermore, *the Supreme Court itself* later considered *Hurley v. Kincaid, supra*, as being *conclusive*. In illustrating what constitutes "a taking," in the case of *Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142, 96 A. L. R. 1, the Court held:

"The government *contemplated* the flowage of the lands, that damage would result therefrom, and that compensation would be payable. A *servitude* was created by reason of *intermittent* overflows which impaired the use of the land for agricultural purposes. \* \* \* *There was thus a partial taking of the lands for which the Government was bound to make just compensation under the Fifth Amendment.*" 78 L. ed., at p. 143.

To support the last sentence above quoted the Court cites *only three cases*, viz., *United States v. Cress, supra*; *United States v. Lynah, supra*; and *HURLEY v. KINCAID, supra*. A study of these *three cases*, applied to respondent's Petition now before this Court, will certainly lead inevitably to ultimate recovery by respondent. The Supreme Court itself deliberately links *Hurley v. Kincaid*, with the *Cress* case and the *Lynah* case as illustrating *what*



has acquired a very definite interest in respondent's land. What the Government has taken is "property" by all the judicial decisions. What the Government has taken, respondent has lost. Respondent's use, control and possession of her land is no longer *absolute*, complete, *unrestricted*, exclusive, unlimited or perpetual. Her integral dominion has been restricted by petitioner's assertion of its right to use whenever it desires by a definite, pre-determinate plan and design. Respondent's *title* has been definitely clouded, and any disposition of the land hereinafter made by her *must* be subject to the superior *property interest* of the Government in her land. Its *market value* has thus very materially been decreased and her *property rights* disastrously diminished. Respondent's "property" has been "taken" even though the land never has been actually used by its new owner, the Government, or physically flooded. Petitioner has asserted its ownership of *flowage rights* or *the right* to flood respondent's property; and that *property right* is in the United States under the Flood Control Act of May 15, 1928, even if actually a flood *never* thereafter comes.

Therefore what the petitioner had already taken from respondent when her suit was filed was a *servitude* pregnant with disaster, rather than any *physical damage* for which the petitioner would not be liable as is hereinafter shown. See C (1), this Point.

In this connection the opinion of the Supreme Court in *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287, is particularly illuminating. There it is seen that the *intention* of the Government is probably the controlling test as to whether or not there has been a taking. There can be no

possible doubt in this case of the intention of the Government to dedicate and sacrifice respondent's land as a part of the floor of the Bbeuf Floodway. That decision also effectually disposes of petitioner's contention that it is not responsible for *fear* engendered in the minds of persons by the Jadwin Plan, and that the facts in the case show that loss of values are due wholly "to a fanciful and speculative apprehension" and do not constitute a taking, as follows:

"There is no doubt that a *serious loss* has been inflicted upon the claimant, as *the public has been frightened off the premises* by the imminence of the guns; and while it is decided that that and the previously existing elements of actual harm do not create a cause of action, it was assumed in the first decision that 'if the government had installed its battery, not simply as a means of defense in war, but *with the purpose* and effect of subordinating the strip of land between the battery and the sea to the *RIGHT* and *PRIVILEGE* of the government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, **THE IMPOSITION OF SUCH A SERVITUDE WOULD CONSTITUTE AN APPROPRIATION OF PROPERTY FOR WHICH COMPENSATION SHOULD BE MADE.**' 231 U. S. 538. *That proposition we regard as clearly sound.*" *Portsmouth L. & H. Co. v. United States*; *supra*, 67 L. ed., at p. 289.

(c) What constitutes a "TAKING"?

A study of the authorities hereinbefore cited has led directly to a solution of the question: What legally constitutes a "taking," within the constitutional sense, as ap

constitutes a "taking" of the lands for which the Government is bound to make just compensation under the Fifth Amendment.

4. The CONSTITUTION, Fifth Amendment, guarantees to respondent as against the petitioner, to every individual property owner as against the Government; "nor shall private *property* be taken for public use, without just compensation."

This leads us to an immediate investigation of (first) what is "*property*"; and (second) what constitutes "*a taking*."

(a) *What is "Property"?*

It is obvious from even a casual reading of its opinion (R. 376-390) that the District Court missed the mark of the legal concept of the term "*property*." The District Court erred in refusing respondent's requested Conclusion of Law No. 29 (R. 340), which correctly declares:

"In a strict legal sense, *land is not 'property,'* but is the subject of property. Property is entirely the creature of the law. It belongs not to physics but to metaphysics, and is *altogether a creature of the mind*. Property in a determinate object is composed of certain constituent elements, namely, the *unrestricted, exclusive and perpetual right of use, enjoyment and disposal of that object*. These rights cannot be materially abridged without, *ipso facto*, taking the owner's property, *Anything which destroys any of these elements to that extent destroys the property itself*. The constitution protects these essential attributes of property. An *easement is property*. Any regulation which imposes a restriction on the use of the property by its owner, and any public improvement which tends to impair the

unrestricted enjoyment of property by affecting some right or easement appurtenant thereto may constitute a public use or taking within the meaning of the Constitution. *Anything* which destroys or subverts the *exclusive* right to freely use, enjoy and dispose of any determinate objects, real or personal, constitutes a 'taking' or destruction *pro tanto* of *property*, notwithstanding there is no disturbance of possession or actual or physical invasion of the *locus in quo*" (R. 340).

"*Property* is the sum of all the rights and powers incident to ownership." *Nashville C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 53 S. Ct. 345, 87 A. L. R. 1191, 77 L. ed. 730, 738.

"The privilege of *use* is *only one* attribute, among many, of the bundle of privileges that make up property or ownership."

*Hennaford v. Silas Mason Co.*, 300 U. S. 577, 582, 57 S. Ct. 524, 81 L. ed. 814, at p. 818;

*Nashville C. & St. L. Ry. Co. v. Wallace*, *supra*;

*Bromley v. McCaughn*, 280 U. S. 124, 136-138, 50 S. Ct. 46, 74 L. ed. 226, 229, 230;

*Burnet v. Wells*, 289 U. S. 670, 676, 678, 53 S. Ct. 61, 77 L. ed. 1439, 1443;

*Mann v. McCarroll, Commissioner, etc.*, (Ark.) decided June 26, 1939, 70 The Law Reporter 700, at p. 704.

No one familiar with the decisions will go astray as to the judicial connotation of the word "property" as it is used in the Constitution.

50 *Corpus Juris*, p. 729, sec. 2; and numerous cases cited in footnotes.

22 *Ruling Case Law*, pp. 37-39, secs. 2 and 3; and cases cited.

50 *Corpus Juris*, p. 745, sec. 17.

Lewis, *Eminent Domain* (3d ed.), secs. 63, 64, and 65, pp. 51-58; and cases there cited.

*Spann v. City of Dallas*, 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387, at p. 1390.

*Buchanan v. Warley*, 245 U. S. 60, 38 S. Ct. 16, 62 L. ed. 149.

*Eaton v. Boston C. & M. R. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147.

*Transcontinental Oil Co. v. Emmerson*, 298 Ill. 394, at p. 401, 131 N. E. 645, 16 A. L. R. 507, 512.

*Shedd v. Patterson*, 312 Ill. 371, at p. 374, 144 N. E. 5, 6.

*Tatum Bros., etc., Co. v. Watson*, 92 Fla. 278, at p. 289, 109 So. 623, 626.

*C. B. & Q. R. Co. v. Public Utilities Com.*, 69 Col. 275, at p. 279, 193 Pac. 726.

*In re: Crook*, 219 Fed. 979, at p. 985.

*Watson v. Wolf*, 162 Pa. 153, at p. 169, 29 Atl. 646, 652.

*Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, at p. 320-321.

*Holst v. Savannah Elec. Co.*, 131 Fed. 931, at p. 942-943.

*State v. Kreutzberg*, 114 Wis. 530, at p. 534, 90 N. W. 1098, 1100.

*Pennsylvania R. R. Co. v. Angel*, 41 N. J. E. 316, at p. 329, 7 Atl. 432.

*Smith v. Campbell*, 10 N. C. 590, at p. 597.

See Appendix C.

In an exhaustive opinion by District Judge Westerhaven on the question of *what is property*, we find the following very clear statement:

“The argument supporting this ordinance proceeds, it seems to me, both on a mistaken view of *what is property* and what is *police power*. Property, generally speaking, defendant's counsel conceding, is protected against a taking without compensation by the guarantees of the Ohio and United States Constitutions; but their views seem to be



that, so long as the owner remains clothed with a legal title thereto and is *not ousted from the physical possession thereof*, his property is not taken, no matter to what extent his right to use it is invaded or destroyed or its *present or prospective value is depreciated*. *This is an erroneous view*. The right to the property, as used in the Constitution, has no such limited meaning.

"As has often been cited in substance by the Supreme Court there can be no conception of property, aside from its control and use, and upon its use depends its value. See *Cleveland, etc., R. R. v. Backus*, 154 U. S. 439; *Branson v. Bush*, 251 U. S. 182; *Block v. Hirsch*, 256 U. S. 135; *Pennsylvania Company v. Mahon*, 260 U. S. 414; *Buchanan v. Warley*, 245 U. S. 60.

"In Ann. Cas. 1918 A, 1201, Mr. Justice Day, amplifying says: 'Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of. *The Constitution protects these essential attributes of property.*' (Cases cited). Property consists of the free use, enjoyment and disposal of a person's acquisition, *without control or diminution, save by the law of the land.*' *Ambler Realty Co. v. Village of Euclid*, 297 Fed. 312, 313.

"*Anything which destroys or subverts exclusive right to freely use, enjoy and dispose of any determinate object, real or personal, constitutes a 'taking' or destruction pro tanto of property, notwithstanding there is no disturbance of possession or actual or physical invasion of locus in quo.*"

*Prairie Pipe Line Co. v. Shipp*, 305 Mo. 663; at p. 672, 267 S. W. 647.

In speaking of even so incorporeal a form of "property" as a contract, this court said:

"The *contract* in question was *property* within the meaning of the Fifth Amendment, and if taken for public use the Government would be liable."

*Omnia Commercial Co., Inc. v. United States*, 261 U. S. 502, 43 S. Ct. 437, 67 L. ed. 773.

And so also, a mere *franchise* is such property. *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463.

The cutting off of a private way across the lands of others, the right of ingress and egress, is a taking of "*property*" for which compensation must be made. *United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54 L. ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas. 680.

"The *property* taken may itself be no more than an *easement*, \* \* \*."

*Drainage Commissioners v. Knox*, 237 Ill. 148, 152, 86 N. E. 636, 637.

"A claim that action is being taken under the *police power* of the state cannot justify disregard of constitutional inhibitions (cases cited)."

*Panhandle E. Pipe Line Co. v. State Highway Com.*, 294 U. S. 613, 55 S. Ct. 563, 79 L. ed. 1090, at p. 1095.

Counsel for petitioner throughout this litigation have erroneously insisted that "*property*" is a *tangible, physical, material thing*. They assume that unless physical trees have been uprooted, material soil has been washed away, visible ditches have been filled, tangible houses and personal property have been destroyed, and tons of water, debris and silt have overwhelmed the physical areas of land owned by respondent, then her "*property*" has not

been taken or damaged. Not so. Such is not the nature of "property"; and such is not the law. See Appendix C.

"It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its *value* entirely, *can inflict irreparable and permanent injury to any extent*, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as these rights stood at the common law, instead of the government, and make it an authority for the *invasion of private right* upon the pretext of the public good, which had no warrant in the laws or practices of our ancestors." *Pumpelly v. Green Bay & Miss. River Canal Co.*, 13 Wall. 166, 20 L. ed. 557, at p. 560; *Lewis, Eminent Domain*, (3d Ed.) Sec. 68, Note 26, at pp. 66-67.

(b) WHAT has been "taken"?

In the instant case the petitioner has appropriated to itself the right to use respondent's land as a floodway at any and all times when the Government deems it necessary or expedient. The Government has impressed a distinct *servitude* upon respondent's property, and to this extent

plied to respondent's property? The answer is inescapable. The Flood Control Act of May 15, 1928, which involves and contemplates an intentional, additional, occasional flooding of respondent's land, and imposes thereon a servitude for that purpose, constituted a taking of respondent's property as soon as the Government began to carry out the project authorized. *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

*Other and Earlier Decisions.* Court decisions prior to the Flood Control Act of May 15, 1928, and not involving that Act, are not pertinent precedents. As hereinbefore shown, by that Act the Congress for the first time deliberately assumed Government liability, and intentionally changed the rule of law theretofore established by judicial decisions as relating to Government responsibility. Notwithstanding this, as though worshipping at the shrine of a fetish, petitioner's counsel continue to harp on such old decisions as *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041; *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363; *Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374; *Sanguinetti v. United States*, 264 U. S. 146, 44 S. Ct. 264, 68 L. ed. 608; *Horstmann Co. v. United States*, 257 U. S. 138, 42 S. Ct. 58, 66 L. ed. 171; *Bedford v. United States*, 192 U. S. 217, 24 S. Ct. 238, 48 L. ed. 414; *Gibson v. United States*, 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996, *et cetera*. Such authorities are more fully hereinafter distinguished and shown not to be applicable to the case at bar. See Point X of this brief.

Nevertheless, it is interesting to note the evolution in the Court decisions of the judicial conception of what constitutes "a taking" of property in the constitutional sense.

The legal principle involved is found in embryo in even the early cases, and when these decisions are studied chronologically the broadening growth of the constitutional idea of "a taking" is more fully appreciated. The facts of the respective cases are immaterial and irrelevant save only as the screen upon which has been pictured for inspection and consideration the ever broadening principle of constitutional liability. No prior decision has ever involved the facts of the case now before the court, unless it be the case of *Hurley v. Kincaid*, *infra*. No decision prior to the Flood Control Act of May 15, 1928, can be entirely apposite, applicable, relevant or equiparant. That Act changed former judicial rules by legislative edict, the authoritative decree now controlling this court. Now, by this statute,

"A plan of river flood control which involves an intentional, additional, occasional flooding of certain lands constitutes a taking thereof as soon as the Government begins to carry out the project authorized."

*Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

*Jacobs v. U. S.*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142.

But even so, in *Pumpelly v. Green Bay & Miss. River Canal Co.*, 13 Wall. 177, 20 L. ed. 557, we find a statement of the fundamental principles on which liability rests stated in the syllabi as follows:

"3. By the general law of European nations and the common law of England, it was a qualification of the right of eminent domain, that compensation should be made for private property taken or sacrificed for public use.

"4. And the constitutional provisions of the United States, and of the several States which declare that private property shall not be taken for public use without just com-



pensation, were intended to establish this principle beyond legislative control.

"5. *It is not necessary that property should be absolutely taken*, in the narrowest sense of the word, to bring the case within the protection of this constitutional provision; but there may be such serious interruption to the common and necessary use of the property as will be equivalent to taking, within the meaning of the statute.

"6. The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand or other material, or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as, by the constitutional provisions, demands compensation." And

In *United States v. Great Falls Mfg. Co.*, 112 U. S. 645; 5 S. Ct. 306, 28 L. ed. 846, the syllabi are as follows:

"1. Where property to which the United States asserts no title is taken by its officers or agents pursuant to an Act of Congress, as private property, for the public use, the Government is under an *implied obligation* to make just compensation to the owner.

"2. Such an implication being consistent with the constitutional duty of the Government, as well as with *common justice*, the owner's claim for compensation is one arising out of *implied contract*, within the meaning of the statute defining the jurisdiction of the Court of Claims, *although there may have been no formal proceedings for the condemnation of the property to public use.*"

"3. The owner may waive any objection he might be entitled to make, based upon the want of such formal proceedings and *electing to regard the action of the Government as a taking under its sovereign right of eminent do-*

main, may demand just compensation for the property." And

In *Great Falls Mfg. Co. v. Garland, Attorney General*, 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527, the general principle is stated:

"The Government is under a constitutional obligation to make compensation for any property or right taken, used and held for the purposes indicated in such Act of Congress, whether it is embraced or described in said survey or map, or not."

In *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463, it is held that THE QUESTION OF COMPENSATION IS JUDICIAL. The syllabi are as follows:

"The compensation for private property taken for public use must, under the 5th Amendment of the Constitution, be a full and perfect equivalent for the property taken.

"The Legislature may determine what private property is needed for public purposes, but *when the taking has been ordered, then the question of compensation is judicial.*

"The court is not concluded by the declaration in the Act of Congress directing the taking for public use of the lock and dam No. 7, of the Monongahela Navigation Company, that the *franchise* of said company to collect tolls shall not be considered in estimating the sum to be paid for the property.

"The right of the national Government, under its grant of power to regulate commerce, to condemn and appropriate lock and dam No. 7 on the Monongahela River belonging to the Monongahela Navigation Company, is subject to the *limitations imposed by the 5th Amendment*, that private property shall not be taken for public uses without just com-

pensation; such just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property; and the assertion by Congress of its purpose to take the property does not destroy the State franchise.

"Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th Amendment, and can take only on payment of just compensation."

*United States v. Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539, is often cited as the leading case on Government liability for property damaged or taken for public use. The entire opinion repays careful study. The following extracts are illuminating:

*"The making of the improvements necessarily involves the taking of property; \* \* \*. The law will imply a promise to make the required compensation, where property to which the Government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses.*

*"Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the Government of the United States.' " \* \* \**

*"Was there a taking? There was no proceeding in condemnation instituted by the Government, no attempt in terms to take and appropriate the title. There was no ad-*

judication that the fee had passed from the land owner to the Government, and if either of these be an essential element in the taking of lands, within the scope of the 5th Amendment, there was no taking. \* \* \*

"It is clear from these authorities that where the Government by the construction of a dam or other public works so flood lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th Amendment. While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. \* \* \*

"But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the Government may appropriate property, it cannot do so without being liable to the obligation cast by the 5th Amendment of paying just compensation.

"\* \* \* Here there is no finding, no suggestion, that by any expense the flooding could be averted." *United States v. Lynah, supra*. So is it in the case at bar.

**GUN CASES.** The Gun cases, *Peabody v. United States*, 231 U. S. 530, 34 S. Ct. 159, 58 L. ed. 351, *Portsmouth Harbor, Land & Hotel Co. v. United States*, 250 U. S. 1, 63 L. ed. 809, and *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, 67 L. ed. 287, should be read in sequence and studied together. In the first two cases liability was denied because damages could not be based upon mere apprehension of possible future damages. It was made clear by the findings that:

"It does not appear from the evidence that there is any intention on the part of the government to fire any of

its guns now installed, or which may hereafter be installed, at said fort in time of peace over and across the lands of the claimants so as to deprive them of the use of the same or any part thereof, or to injure the same by concussion or otherwise," etc. 58 L. ed. at p. 353.

In the case at bar, the *intention* on the part of the Government to use the Boeuf Basin floodway whenever necessary is indisputably proved by merely reading House Document No. 90 (the Jadwin Plan), given the force and sanction of law by the Flood Control Act of May 15, 1928.

The last case above cited compels a finding of liability in this Boeuf Floodway suit. The apposite principle found in *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327, 67 L. ed. 287, is as follows:

"There is no doubt that a serious loss has been inflicted upon the claimant, as the public has been frightened off the premises by the imminence of the guns; and while it is decided that that and the previously existing elements of actual harm do not create a cause of action, it was assumed in the first decision that 'if the Government has installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude, would constitute an appropriation of property for which compensation should be made.' 231 U. S. 538. That proposition we regard as clearly sound. The question is whether the petition before us presents the case supposed." \* \* \*



"\* \* \* If the United States, with the admitted *intent* to fire across the claimants' land at will, should fire a single shot or put a fire control upon the land, it well might be that the taking of a right would be complete. But even when *the intent* thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it. Every successive trespass adds to the force of the evidence. The establishment of a fire control is an indication of an *abiding purpose*. The fact that the evidence was not sufficient in 1905 does not show that it may not be sufficient in 1922. As we have said, *the intent* and the overt acts are alleged, as is also the conclusion that the United States has taken the land. That we take to be stated as a conclusion of fact, and not of law, and as intended to allege the actual import of the foregoing acts. In our opinion the specific facts set forth would warrant a finding that a servitude has been imposed. \* \* \*

"\* \* \* If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied, whether it was thought of or not." 67 L. ed. 289-290.

*United States v. Cress*, 243 U. S. 316, 37 S. Ct. 380, 61 L. ed. 746, is valuable in establishing the proposition that liability is *not* dependent upon a *total destruction of value*. After reviewing many cases of liability, the court, in its opinion holds: "It is contended \* \* \* that the damage to Cress's land by the overflow of 6 6/10 acres, because it *depreciated its value only to the extent of one-half, does not measure up to a taking, but is only a 'partial injury,'* for which the Government is not liable. The findings, however, render it plain that this is not a case of temporary flooding or of *consequential injury*, but a *permanent con-*

# MICRO CARD

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*dition*, resulting from the erection of the lock and dam, by which the land is 'subject' to frequent overflows of water from the river. That overflowing lands by permanent backwater is a direct invasion, amounting to a taking, is settled by *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. 166, 177, 20 L. ed. 557, 560; *United States v. Lynah*, 188 U. S. 445, 468-470, 47 L. ed. 539, 547-549, 23 Sup. Ct. Rep. 349. It is true that in the *Pumpelly* Case there was an almost complete destruction, and in the *Lynah* case a complete destruction, of the value of the lands, while in the present case the value is impaired to the extent of only one-half. But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.

"\* \* \* While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. \* \* \* There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitable recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land. \* \* \* where formal proceedings are initiated by the party condemning, it is usual and proper to specify the precise interest taken, where less than the fee. But where, as in this case the property owner resorts to the courts, as he may, to recover compensation for what actually has been taken, upon the principle that the Government, by the very act of taking,

impliedly has promised to make compensation because the dictates of justice and the terms of the 5th Amendment so require (cases cited), and it appears that less than the whole has been taken and is to be paid for, such a right or interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking." *United States v. Cress, supra.*

In *Jacobs v. United States*, 45 F. (2d) 34, (C. C. A. 5th) in holding liability against the government, the court uses the following language particularly applicable to the case now before this court:

"It plainly appears\* \* \* from the acts of Congress above quoted from that in planning and erecting the dam mentioned *the Government contemplated that flowage damage to privately owned property would result therefrom, for which compensation would be payable.* The court's findings of facts including findings to the effect that the dam mentioned *slightly increased the height of intermittent rises in the river, that the overflows reaching the appellant's land after the construction of the dam were not continued, but occasional; that his land which had been subject to overflow before the dam was built became slightly more subject to such overflows since its construction; that appellant's customary use of his land was prevented for short periods of time; and that the use of the land for agricultural purposes was impaired by the floodwaters after the dam was built.* Thus it appears that the burden of *the servitude to which, by reason of intermittent overflows, land of appellant was subject before the dam was erected was increased as a result of the erection of the dam, and that the erection of the dam had the effect of interrupting appellant's customary use of his land, and of impairing to*



*some extent* the use of that land for agricultural purposes. As a riparian owner, *appellant had the right to enjoyment of the natural flow of the river without burden or hindrance imposed by artificial means*, and no public easement beyond the natural one can arise without grant or dedication, save by condemnation *with appropriate compensation* for the private right. *United States v. Cress*, 243 U. S. 316, 321, 37 S. Ct. 380, 385; 61 L. ed. 746."

*Jacobs v. United States*, *supra*. See also 63 F. (2d) 327, affirmed 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142.

In affirming the *Jacobs case*, the Supreme Court of the United States stated:

"The Government *contemplated* the flowage of the lands, that damage would result therefrom, and that compensation would be payable. *A servitude was created by reason of intermittent overflows which impaired the use of the lands for agricultural purposes.* \* \* \* There was thus a partial taking of the lands for which the Government was bound to make just compensation under the Fifth Amendment." 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142.

In support of the last quotation the Supreme Court cites as authority its former decision in *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637, together with the *Lynch* and *Cress* cases, and the court again calls attention to the fact that:

"The fact that the condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. *Statutory recognition was not necessary.* Such a promise was implied because of the duty



to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States. U. S. C. A. title 28, Sec. 41 (20)."

*Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed 142.

In *Pennsylvania Coal Company v. Mahon*, 260 U. S. 393, 43 S. Ct. 158, 67 L. ed. 322, the court held that a statute forbidding the mining of coal under private dwellings or streets or cities in places where the right to mine such coal is reserved in the grant is unconstitutional, *as taking property* without due process of law. In the opinion the court says:

"The general rule, at least, is that while property may be regulated to a certain extent, *if regulation goes too far it will be recognized as a taking*. We are in danger of forgetting that a strong public desire to improve the public conditions is not enough to warrant achieving the desire by a shorter cut than the *constitutional way of paying* for the change." 67 L. ed., pp. 325, 326.

See also opinions in the following cases which discuss, illustrate and clarify what constitutes "a taking:"

*Miss. & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206, 208.

*United States v. Williams*, 188 U. S. 485, 23 S. Ct. 363, 47 L. ed. 554.

*Manigault v. Springs*, 199 U. S. 473, 26 S. Ct. 127, 50 L. ed. 274, at p. 280.

*United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54 L. ed. 787.

*United States v. Sewell*, 217 U. S. 601, 30 S. Ct. 691, 54 L. ed. 897.

*United States v. Grizzard*, 219 U. S. 180, 31 S. Ct. 162, 55 L. ed. 165, at p. 166.

- Curtin v. Benson*, 222 U. S. 78, 32 S. Ct. 31, 56 L. ed. 102, at pp. 105-106.
- Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. ed. 570.
- Richards v. Washington Terminal Co.*, 233 U. S. 6, 34 S. Ct. 654, 58 L. ed. 1088.
- United States v. North American Transp. & Trading Co.*, 253 U. S. 330, 40 S. Ct. 518, 64 L. ed. 935, at p. 937.
- Duckett & Co. v. United States*, 266 U. S. 149, 45 S. Ct. 38, 69 L. ed. 216, at p. 219.
- Campbell v. United States*, 266 U. S. 368, 45 S. Ct. 115, 69 L. ed. 328, at p. 330.
- Panhandle E. Pipe Line Co. v. State Highway Com.*, 294 U. S. 613, 55 S. Ct. 563, 79 L. ed. 1090.
- Hersch v. United States*, 15 Ct. Cls. 385.
- Merriam v. United States*, 29 Ct. Cls. 250, at pp. 258-259.
- Wayne County, Ky. v. United States*, 53 Ct. Cls. 417; aff'd. 252 U. S. 574, 40 S. Ct. 394, 64 L. ed. 723.
- Chappel v. United States*, 34 Fed. 673, 674-675.
- In Re: Delafield*, 109 Fed. 577, 579-580.
- United States v. Hess*, 70 Fed. (2d) 142, and 71 Fed. (2d) 78.
- United States v. Chicago, B. & Q. R. Co.*, (C.C.A. 8th) 82 Fed. (2d) 131, 106 A. L. R. 942.
- United States v. Wabasha-Nelson Bridge Co.*, (C.C.A. 7th) 83 Fed. (2d) 852.
- Fruth v. Board of Affairs*, 75 W. Va. 456, 460-461, 84 S. E. 105, 106, L. R. A. 1915C 981.
- Bruch v. Carter*, 32 N. J. L. 554, at pp. 561-562.
- Fitzhugh v. City of Jackson*, 132 Miss. 585, 610, 97 So. 190, 33 A. L. R. 279.
- Lovett v. West Virginia Central Gas Co.*, 65 W. Va. 739, 743, 65 S. E. 196, 24 L. R. A. (N. S.) 230.
- Traut v. White*, 46 N. J. E. 437, 440, 19 Atl. 196.
- Myer v. Adam*, 71 N. Y. S. 707, at p. 710.
- Wateree Power Co v. Rion*, 113 S. C. 303, 308, 102 S. E. 331.

*Forster v. Scott*, 136 N. Y. 577, 584-585, 32 N. E. 976,  
18 L. R. A. 543.

*St. Louis v. Hill*, 116 Mo. 527, 533-534, 22 S. W. 861, 21  
L. R. A. 226.

*School Corporation v. Heiney*, 178 Ind. 1, 7-8, 98 N. E.  
628, 43 L. R. A. (N. S.) 1023.

*Glover v. Powell*, 10 N. J. E. 211, at p. 229.

*In Re: Jacobs*, 98 N. Y. 98, 105.

*Old Colony, etc., R. Co. v. County*, 14 Gray 155, at p.  
161.

*Thompson v. Androscoggin River Imp. Co.*, 54 N. H.  
545, 552.

*Stockdale v. Rio Grande W. R. Co.*, 28 Utah 201, 210-  
211, 77 Pac. 849, 852.

*People ex rel. M. W. Advertising Co. v. Murphy*, 113  
N. Y. S. 855, 857.

*Webster County v. Lutz*, 234 Ky. 618, 625, 28 S. W.  
(2d) 966.

*Martin, et al., ex parte*, 13 Ark. 198, at pp. 206-207.

*Lewis, Eminent Domain*, (3d ed.) sec. 889, p. 1545.

*Lewis, Eminent Domain*, (3d ed.) sec. 71, p. 69.

*Lewis, Eminent Domain*, (3d ed.) sec. 74, pp. 73-76.

*Lewis, Eminent Domain*, (3d ed.) sec. 75, p. 78.

*Lewis, Eminent Domain*, (3d ed.) sec. 78, pp. 86-88.

*Lewis, Eminent Domain*, (3d ed.) sec. 85, p. 100.

*Lewis, Eminent Domain*, (3d ed.) sec. 88, p. 107.

*Lewis, Eminent Domain*, (3d ed.) sec. 112, p. 154.

20 *Corpus Juris*, p. 684, sec. 147.

See Appendix D to this brief.

The opinion of the Supreme Court in *Richards v. Washington Terminal Company*, *supra*, is peculiarly applicable in principle to the facts in the case at bar, and its language could well be paraphrased and applied in the instant case. See 233 U. S. 546, 34 S. Ct. 654, 58 L. ed. 1088, at p. 1093. See Appendix D.

In a carefully considered, essentially sound, decision of the Arkansas Supreme Court, in determining the valid-

ity of an act of the General Assembly in 1851 providing for the reclaiming of swamp and overflowed lands by levees and drains, but making no provision for the compensation of individuals for property taken or injured in constructing such levees and drains, the court said:

“The constitution of this State contains no provision that private property shall not be taken for public use, without just compensation; yet, we hold that *this prohibition upon the Legislature, is implied from the nature and structure of our Government*, even if it were not embraced by necessary implication in other provisions of the bill of rights. The right of eminent domain is inherent in the Government or sovereign power, and equally so is, or ought to be, in every Government of laws, the vested right to his property in the citizen; and the *right of eminent domain means that, when the public necessity or common good requires it, the citizen may be forced to sell his property for its fair value. The duty of making compensation may be regarded as a law of natural justice, which has its sanction in every man's sense of right, and is recognized in the most arbitrary Governments. To suppose that the Legislature, under our constitution, possessed the power of divesting the citizen of his right to property without first providing in some equitable mode for ascertaining its value, and making him compensation for it, and could exercise this power without restraint, would be subversive of the Government and equivalent to revolution and anarchy, since it would defeat one of the primary objects for which the Government was established.* \* \* \* The right of the citizen to acquire, possess and protect property, thus guaranteed to all by the fundamental law, being a limitation imposed by the people upon the Government of their own creation, and

designed to protect the weak against the strong, the minority against the majority, would be of little avail and but an empty sound, if the legislative department possesses the power to divest him of it without adequate compensation, through caprice, or even in the exercise of honest but misguided judgment, or, upon that most dangerous of all pretenses, for State reasons, and the policy of promoting what may be deemed the public good."

*Martin et al. Ex parte*, 13 Ark. 198, 206-207.

"An implied promise is created by law as well as by natural justice that the owner of property shall receive its value from a party who may have appropriated it to his use and benefit. This is as much the case where the Government enjoys the property as in the instances of a private individual." *Hersch v. United States*, 15 Ct. Cls. 385.

"The police power springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no *unrestricted authority* to accomplish whatever the public may presently desire." "The police power of the state cannot justify disregard of constitutional inhibitions." "The taking of property for public use, without compensation, ordinarily, is inhibited by the Fourteenth Amendment."

*Panhandle East Pipe Line Company v. State Highway Com.*, 294 U. S. 613, 55 S. Ct. 563, 79 L. ed. 1090.

*Recent Decisions.* Such recent decisions as *United States v. Chicago, B. & Q. R. Co.*, *supra*, and *United States v. Wabasha-Nelson Bridge Co.*, *supra*, nicely illustrate the judicial evolution of the legal concept involved in the Fifth Amendment prohibiting the taking of private property for public use without just compensation. In *Chicago, B. & Q.*



*R. Co., supra*, decided February 10, 1936, the present lack of controlling value of the old decisions, on which counsel for petitioner continue to rely with such bulldog tenacity, is pointed out by the Court (C.C.A. 8th), in the following language:

"It is probable that *time was* when many of the States of the Union, on the matter of condemnation of private property for public use, *gave damages only when the property was actually taken*, and for so much as was actually taken, and refused to award compensation in cases wherein such property, or the remainder of the parcel, was only hurt or damaged as a consequence of the actual taking. But *long since, recognizing the utter injustice of so narrow a view*, amendments to the organic laws, to statutes, and *changes in judicial interpretation* well-nigh universally, have so *changed the rule* as now to give compensation for proximate damages to remaining parts of a parcel of land when some part thereof has been actually taken. In short, such change was wrought by adding to the word 'taken' in the provisions of the Constitution, or to the statute, *or by judicial interpretation*, the words '*or damaged.*'

"Many early decisions of numerous state courts, and federal courts as well (cf. *Gibson v. United States*, 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996), may, it is probable, be found, in which, in effect it was held that compensation could be recovered only for the fair market value of the land actually expropriated, and that nothing could be recovered for damages accruing to other lands, or parts of the parcel taken, when such were not actually taken but only damaged, that is, *reduced in value*, or use, by the taking of other portions of the affected parcel.

"BUT THIS RULE WAS, SO OBVIOUSLY UNJUST THAT IT HAS BECOME OUTMODED AND BEEN DISCARDED PRACTICALLY IN ALL JURISDICTIONS. . . .

"For the identical principle, now found in the *recent liberalized views* of what constitutes 'just compensation,' was long ago, in the Bauman Case, *supra*, laid down thus: 'The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.' " 82 Fed. (2d) at pp. 134-135.

Any number of additional, supporting authorities could be cited; but the foregoing should suffice to portray the principles sustained by the overwhelming weight of authority in the judicial world, principles which, as they are read, this court will instinctively apply to the facts in the present case as reflected by the allegations of the petition and this record. See Appendix D.

When the petition in the case at bar is read in the light of the foregoing authorities, the petitioner must expect an adjudication of "taking" in the constitutional sense, as the Congress intended. The material allegations of the petition are indubitably established by official records and uncontradicted testimony. The admitted facts impel the judicial mind to the irresistible conclusion of petitioner's liability. There is no logical escape. Every requirement of natural justice, common sense and judicial reasoning conspires to write judgment here for respondent.

(d) **WHEN was the property "taken"?**

This court is evidently of the opinion that the "taking" under the Flood Control Act of May 15, 1928, was complete, and respondent's right of action accrued, "as soon as the Government *begins* to carry out the project authorized." *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637. Thus the Court recognized that the Flood Control Act adopted, and authorized the construction of, "one, unified, comprehensive flood control plan"; that the entire project is indeed *one, single project*, the entire Jadwin Plan being a *unit*. See Point II this brief.

The "taking" of respondent's property was effected and completed by the following overt acts by petitioner, to-wit:

(1) Passage of the Flood Control Act of May 15, 1928, adopting, and authorizing the completion of, the Jadwin Plan, when approved by the President (R. 118); followed by

(2) The President's proclamation of August 13, 1928, approving the Jadwin Plan (R. 128); followed by

(3) The President's proclamation of January 10, 1929, definitely authorizing condemnation of land for rights-of-way for the Boeuf Floodway (R. 128).

Thereby the project became "fixed and not subject to review or change," save only by the Congress. See House Com. Doc. No. 2, 71st Congress, 1st session (R. 127-129). Thus, clearly, for the first time, the Boeuf Floodway became definite, fixed and certain on January 10, 1929, which date we affirm to be the time of the taking by the Government of respondent's property.

As was stated by the then Attorney General of the United States on July 19, 1929:

"Nowhere in the act does it appear that any latitude whatever is permitted with respect to the project covered by the act, save and except as is provided for in connection with the recommendations of the special board and the decision of the President thereunder. As pointed out heretofore, the board having acted and completed its duties and the President having made his decision upon such recommendations of such special board, and such decision having been acted upon to a greater or less extent by the officers in charge of the project, it would seem that the project covered by the act *has now become fixed and definite* with no power of modification or change, except as provided in the project itself, by any authority save the Congress. \* \* \*

"For the above reasons, I am of the opinion that the project set forth in House Document No. 90, Seventieth Congress, first session, *is the legal project* to be executed in accordance with the law and that *this project is fixed and not subject to review or change by this administration.*" (House Com. Doc. No. 2, July 19, 1929, R. 127-129).

Clearly the District Court was in error in stating, and in acting upon the assumption, that: "It is clear, therefore, that the *Flood Control Act was only an enabling Act.*" (R. 360 vs. R. 129.)

"Immediately following the passage of the Flood Control Act of 1928, *work was begun* on the Jadwin Plan as one, unified, comprehensive project for the flood control of the alluvial valley of the Mississippi River, funds being available at the time; and the work has proceeded practically

without cessation since that time" (petitioner's chief expert Mathes, R. 244).

We therefore submit that this Court has already practically adjudicated that the taking of respondent's property was legally completed by January 10, 1929.

(4) On July 1, 1929, pursuant to the authority of the President's proclamation of January 10, 1929, petitioner's condemnation suit in the Boeuf Floodway was actually filed (R. 129); and

(5) On July 1, 1929, the Court issued an INJUNCTION prohibiting "all persons," including respondent, from interfering in any way with the *full possession of the United States* (R. 129-130); which suit was not dismissed, and which injunction was not dissolved, until December 18, 1934 (R. 130), *long after* respondent had filed her present action (R. 16).

(6) Petitioner, as a matter of law, assumed full control of the fuse plug levee as a spillway *essential* to the Jadwin Plan, thereby depriving respondent of her inherent right to defend her property against the flood waters of the Mississippi River by the Act itself (Doc. 90, Sec. 120, R. 124), the moment the Act became finally effective and operative as to the Boeuf Floodway on January 10, 1929 (Secs. 1 and 9 of the Act, R. 118-119), by the President's proclamation of approval of that date (R. 128).

(7) The actual construction work done by petitioner under authority of the 1928 Act had resulted in the Boeuf Floodway being actually in operative condition since approximately 1932. See Point III this brief.

Respondent, and other property owners in the Boeuf Floodway, for the past 6 years have lived under the con-



stant menace of the use of the floodway for destructive floods. As the Government has, month by month, increased the heights of the levees on the main river above and opposite respondent's property, has strengthened those levees, and has closed crevasses and natural outlets, so month by month has respondent's peril of flood increased. No man can tell when the flood will come (R. 172). It may come *any* year. *Each* year may be "*the flood year*" (R. 246). "Therefore be ye *always ready*." The dwellers in Boeuf Floodway live under *perpetual* condemnation. Therefore, who will buy their lands except at the pitiful, predatory, ghoulish prices of the looter and the gambler?

Only the providential and fortuitous fact that an unexpected cycle of droughts and low water has prevailed has heretofore prevented petitioner's actual use of the Boeuf Floodway. The twelve-year period, during which petitioner *guessed* in 1928 the floodway would be used, is rapidly drawing to a close. If the official estimate (Doc. 90, Sec. 119, R. 124) be correct, respondent's calamity is indeed impending. In justified anticipation of this catastrophe, for 6 years the market value of respondent's land has been destroyed, or disastrously diminished and impaired. Certainly to that extent respondent's "property" has been "taken."

"And when the implied promise to pay has once arisen, a later denial by the government (whether at the time of suit or otherwise) of its liability to make compensation *does not destroy the right* in contract and convert the act into a tort." *Tempel v. United States*, 248 U. S. 121, 39 S. Ct. 56, 63 L. ed. 162, at p. 165.

"The property may be appropriated by an act of the Legislature. \* \* \* *Mississippi & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206.

"It may justifiably be assumed that the adoption by Congress of a plan of river flood control which involves an intentional, additional, occasional flooding of certain lands constitutes a taking thereof as soon as the government begins to carry out the project authorized,"—"as soon as work on the project is begun."

*Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637, 638.

*Danforth v. United States*, 102 F. (2d) 5, 10.

*In re: Mayor*, 58 N. Y. S. 58, 60.

*Louisville & N. R. Co. v. Lambert*, 33 Ky. L. R. 199, 110 S. W. 305, 307.

*Ft. Wayne & S. W. T. Co. v. Fort Wayne & W. R. Co.*, 170 Ind. 49, 53, 83 N. E. 665, 16 L. R. A. (N. S.) 537.

*Hampden, etc., Co. v. Springfield, etc., R. Co.*, 124 Mass. 118.

*In re: Department of Public Parks*, 6 N. Y. S. 750.

*People ex rel. Canavan v. Collis, Commissioner of Public Works*, 46 N. Y. S. 727, 728.

*Chelton Trust Co. v. Blankenburg*, 241 Pa. 395, 396, 88 Atl. 664, 665.

*In re: Philadelphia Parkway*, 250 Pa. 257, 95 Atl. 429, at pp. 430-431.

See Appendix E, this brief.

"While the owner is not to be disseized until compensation is provided, neither, on the other hand, when the public authorities have taken such steps as finally to settle upon the appropriation ought he to be left in a state of uncertainty, and compelled to wait for compensation until some future time, when they may see fit to use his land. The land should be either his or he should be paid for it. When

ever, therefore, the necessary steps have been taken on the part of the public to select the property to be taken, locate the public work and declare the appropriation, the owner becomes absolutely entitled to compensation, whether the public proceed at once to occupy the property or not. If a street is legally established over the land of an individual, he is entitled to demand payment of his damages, without waiting for the street to be opened." *Cooley's Const. Lim.*, (7th ed.) p. 818.

"Granting the compensation here to be, what it certainly is, the price of a *perpetual easement*, it is impossible to imagine a title to it in a subsequent grantee of the land subject to the easement.

"And in *McFadden v. Johnson*, 72 Pa. 336, 13 Am. Rep. 681, the same court held that the damages to land, occasioned by the construction of a railroad, were a *personal claim by the owner when the injury occurred*—that they *did not run with the land, nor pass by a deed, though not reserved*.

"Numerous authorities to the same effect may be found collected in *Wood on Railroads*, vol. 2, p. 994; and the conclusion established by the decisions is there said to be that *the damages belong to the owner at the time of the taking*, and do not pass to a grantee of the land under a deed made subsequent to that time, unless expressly conveyed therein.

"So, too, it has been frequently held that if a landowner, knowing that a railroad company has entered upon his land and is *engaged in constructing its road without having complied with the statute*, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the

work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages. *Lexington & O. R. Co. v. Ormsby*, 7 Dana, 277; *Harlow v. Marquette, H. & O. R. Co.*, 41 Mich. 366; *Cairo & F. R. Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564; *Pettibone v. La Crosse & M. R. Co.*, 14 Wis. 443; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 282, 53 Am. Rep. 622."

*Roberts v. N. P. R. R. Co.*, 158 U. S. 1; 15 S. Ct. 756, 39 L. ed. 873, at pp. 876, 877.

These authorities make it clear that the compensation is to be awarded to the owner at the time of the taking, respondent Mrs. Sponenbarger; that any subsequent purchaser must take subject to the easement heretofore acquired by the United States, the loss in value to be forever borne by respondent Mrs. Sponenbarger; and that a perpetual easement was impressed on the land for floodway purposes, and respondent's property was thus "taken," January 10, 1929.

**C. ACTUAL INVASION.** For lack of any better defense, counsel for petitioner have argued strenuously at every opportunity that there has been no taking of respondent's property because there has been no physical invasion of her land by the actual flooding of the Boeuf Floodway. Counsel argue that unless there has been an actual physical destruction of the corpus of physical property there can be no "taking" within the meaning of the Fifth Amendment. In fact, this is the *only defense* tendered by petitioner in this case. All else which has been offered goes *only* to an attempted *mitigation of damages*. This is all irrelevant, immaterial, incompetent, beside the point, misleading and confusing.

The District Court held: "The plaintiff is not entitled to claim damages, if any, until, if and when said fuse plug actually operates and places additional flood waters over and across plaintiff's land" (R. 370, Par. 8); "before the plaintiff in the instant case can recover, she must show that there has been an actual invasion of her *land* amounting to an ouster and *overflow* of such permanent character as to imply an intention to take" (R. 373, Par. 18). See also opinion of District Court, R. 385-386.

The District Court *refused* to correctly declare the law as follows: "No actual, physical invasion is necessary to constitute a 'taking' in the constitutional sense. *Any* substantial interference with private property which destroys, or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is a 'taking' even though the title and possession of the owner remain undisturbed, and there is no actual, physical invasion of the property. Property is 'taken' when any of its proprietary rights are taken, of which property consists. That there may be a taking of property without actual physical invasion of it has often been held, and is a well established legal principle" (R. 340, Par. 20); and: "flooding of property is not a 'taking' where the property has already been acquired for, and dedicated to, that purpose. Therefore, if, as and when the petitioner's property is actually flooded or invaded for actual flowage by the United States, there can be no other or further recovery by the petitioner. Actual damages for physical invasion are not recoverable against the United States, and such damages are not properly an issue in the case at bar. (*Mullen Benevolent Corporation v. United*



*States*, 290 U. S. 89, 54 S. Ct. 38, 78 L. ed. 192)" (R. 341, Par. 32).

These are egregious errors (Assignments Nos. 8, 209, 229, 230, 236, 238, R. 99-113). The mind imbued with the apposite legal principles repeatedly announced and exemplified in the decisions reviewed in this brief cannot easily fall into such palpable error.

To suggest that respondent can recover damages after flooding (R. 370 and 373) is a cruel delusion. The record suggests that this is probably how petitioner's representatives treacherously snared the minds of their lay witnesses. Some of these witnesses were taken "on a boat in the Mississippi River, in the presence of certain Government Engineers and attorneys" (R. 228). After such schooling, these witnesses each based his testimony on a *fatally erroneous premise of fact*. How else, but by those who thus deceptively prepared petitioner's case, could their witness Farrell have been induced to base his testimony on the assured premise, *pitifully false*: "If the Government exercises its right to overflow my land, I expect \$100 an acre for damage to my cultivated land and \$25 for the wood land" (R. 225)? Only crass ignorance of the law, ingenious sophistry, or bold and malicious inconsistency can account for any such fallacy.

(1). *Physical Invasion Would Create No Right of Action*. This Court well knows, as a matter of law, that the United States is not responsible for any such damages. The Tucker Act authorizes the filing of no such claim in *tort*. If respondent had waited until her land was actually flooded and then filed suit, her action would be promptly dismissed on demurrer because (a) barred by limitation

and (b) non-liability of the Government for any such damage. Then respondent would be hopelessly and forever lost.

"It is a fundamental principle that no *damages* lie against either Federal or State Government" (Doc. 90, Sec. 32).

Section 3 of the Flood Control Act of May 15, 1928, expressly provides: "No liability of any kind shall attach to or rest upon the United States for *any damage* from or by floods or flood waters at any place." This language is clear, all inclusive, prohibitive, and mandatory. Furthermore, this is merely a statutory declaration of the pre-existing law. See *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041; *Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374; *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363.

In *Mullen Benevolent Corporation v. United States*, 63 Fed. (2d) 48, 56; the Court emphatically and correctly declares: "*Flooding the property was not a taking where the property was already acquired for and dedicated to that purpose.*" How promptly would petitioner confront respondent with that principle of law should she wait until her land had actually been flooded, being chargeable all the time with full knowledge that as a matter of fact and law her land had already *long since* been "dedicated to that purpose" by the Flood Control Act of May 15, 1928! How cruel and indefensible for Government counsel and engineers to persuade property owners not to sue for damages until their lands and personal possessions have been physically destroyed by flood waters, and then, when such dis-

treassing exigency has occurred, gloatingly confront the property owner with the utter futility of suing the Government for such physical damages after they have occurred.

In the present action, respondent does not seek to recover *damages* in violation of the legal principles just referred to, but, by authority of the Fifth Amendment and the Tucker Act, she does seek to recover compensation for a "*TAKING*" of certain of her property rights. The *invasion* for which respondent seeks recovery is the direct invasion of her *property right* of *exclusive* use and *unrestricted* dominion. Petitioner, by authority of the Flood Control Act of May 15, 1928, having heretofore taken the *right* to use respondent's land as a part of the floor of the Boeuf Floodway, for its later actual use by the Government at any time, as intended, there certainly can be no different nor additional recovery. Respondents remedy is *NOW*, or not at all.

(2) If respondent were in error as to this point, then indeed would petitioner be faced with results both disastrous and calamitous to it. Were it held that the Government is liable for all actual flood damages hereafter sustained, this indeed would be signing a blank check on the treasury of the United States. After each flood, while public consciousness was sensitive, sympathetic and responsive, there would doubtless result an immediate raid on the public treasury for an unlimited and unconscionable amount of alleged damages.

(3) But such is not the law. To prevent this very possibility the Congress expressly declared in Section 4 of the 1928 Act:

"The United States *SHALL* provide *flowage rights* for additional destructive flood waters that will pass by reason of *diversions from the main channel of the Mississippi River.*"

When read in connection with section 3, does this not clearly mean that the United States disclaims liability for damages but *admits liability* for the *taking* of the *right* to divert waters from the main channel of the Mississippi River over respondent's property on the floor of this diversion channel—the Boeuf Floodway? The United States *takes an easement* for a definite purpose which constitutes a *servitude* on respondent's property. It is for this *servitude* that petitioner must pay now. Its right has *now* been taken. It is of no concern to respondent whether or not the United States *ever actually uses* this easement which it has thus acquired. The *right to use* her property has been taken under the sovereign power of eminent domain by proper legislation, and *this* is what has practically destroyed the market value of respondent's land. It is *NOW* subject to petitioner's use at all times.

Then, how foreign to both fact and law is the erroneous Finding of the District Court:

"The property of plaintiff and those similarly situated is not subjected to any additional servitude from excessive flood waters than existed prior to the passage of the Flood Control Act of May 15, 1928" (R. 365, Finding of Fact No. 44).

If respondent's title has not been seriously affected, why did Congress enact Section 4 of the Flood Control Act of May 15, 1928? Certainly not to authorize the payment of physical damages which is prohibited in Section 3. Why

was the Overton Bill passed June 15, 1936 (Public-678; 33 U.S.C.A., Secs. 702a-10), recognizing the right of the property owners to compensation *before the use of the floodway?* Clearly petitioner's contention anent *physical invasion* and actual, *tangible damages* is not compatible with the mind of Congress, nor the facts in the case.

Both the 1928 Act and the 1936 Act recognize the legal fact that the United States *IS* responsible for the depreciation in land values on the floor of the authorized floodways. Existing undisputed physical facts and innumerable official Public Documents, cited in this brief, both justify and enforce the "*fear*" on the part of the public which has destroyed the *marketability* of respondent's land, squarely within the doctrine announced in *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287, at p. 289.

If petitioner is correct in its position that respondent has *not yet* been damaged by the taking of her property, then the Congress certainly betrayed the American people, two years after respondent's suit was filed, by authorizing an appropriation of \$20,000,000 to compensate property owners for flowage rights in a similar floodway, in either of which respondent's property is included at the very head thereof. See Sec. 12, Flood Control Act of June 15, 1936, Public No. 678, 74th Congress, the Overton Act making the Markham Plan optional. This authorized compensation is approximately 80% of the market value of the lands in the floodway before the taking (R. 146-147). In fact the Flood Control Act of June 15, 1936, repudiates and refutes the entire theory of the defense presented in the instant case, viz., that respondent has suffered no damage from having her land dedicated as a part of the floor of a floodway



for the Mississippi River designed to carry a volume of water six times that which flows over Niagara Falls. This 1936 Act authorizes the appropriation of \$272,000,000, in addition to the \$325,000,000 authorized by the 1928 Act, based on the definite assumption that the fuse plug levee below the mouth of the Arkansas River will be, and *must be*, kept at the 1914 grade. Chief of Engineers Jadwin said the fuse plug *must* be left at the 1914 grade and section if the flood control plan for the whole alluvial valley is to function. Congress has invested more than \$600,000,000 on the assumption that it would work, and that the fuse plug levee would be *kept* at the 1914 grade. This is now all past history. The servitude on respondent's property is now complete as a physical fact. The enormous flood which inundated the State of Mississippi in 1927 *must now* be diverted over respondent's land under similar circumstances. Respondent lost her market value *years ago*. No future speculation is involved. This loss was caused by things which have *already* happened in the past. Respondent seeks no recovery in advance, but rather compensation for a loss long since sustained by the subjection of her property to a servitude *years ago*.

IF the flooding of respondent's land in the future by waters that overtop and crevasse the fuse plug would not be a taking, and the *right already acquired* to so flood the land is not a taking, it obviously follows that respondent's "property" can *never* be taken. If so, when? What further physical construction can the Government do to perfect that right than has already been done?

Every member of the Congress who spoke on the Bill understood that the passage of the Flood Control Act of

May 15, 1928, would result in a "taking" of property on the floor of the floodways. See Point V, B, 2 of this brief.

(4) *Decisions.* Respondent's position is by no means novel.

"That there may be a taking of property without actual physical invasion of it has often been held."

*Arkansas Highway Commission v. Kincannon*, 193 Ark. 450, at p. 452, 100 S. W. (2d) 969.

*City of Big Rapids v. Big Rapids F. M. Co.*, 210 Mich. 158, 174, 177 N. W. 284, 289.

*Buchanan v. Warley*, 245 U. S. 60, 38 S. Ct. 16, 62 L. ed. 149, 163.

*Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287.

*Richards v. Washington Terminal Co.*, 233 U. S. 546; 34 S. Ct. 654, 58 L. ed. 1088.

*Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543.

*Chappel v. United States*, 34 Fed. 673.

*School Corporation v. Heiney*, 178 Ind. 1, 98 N. E. 628, 43 L. R. A. (N. S.) 1023.

*In re: Jacobs*, 98 N. Y. 98.

*Stockdale v. Rio Grande W. R. Co.*, 28 Utah 201, 77 Pac. 849-852.

*St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226.

*People v. Murphy*, 113 N. Y. S. 855.

*Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 545.

*Old Colony, etc., R. Co. v. County of Plymouth*, 14 Gray 155.

*Webster County v. Lutz*, 234 Ky. 618, 28 S. W. (2d) 966.

*Hot Springs R. R. Co. v. Williamson*, 45 Ark. 429, affirmed 136 U. S. 121, 10 S. Ct. 955, 34 L. ed. 355.

"It is a transparent fallacy to say that this is not a taking of his property, because the land itself is not taken,

and he utterly excluded from it, and because the title, nominally, still remains in him, and he is merely deprived of its beneficial use, which is not the property, but simply an incident of property. Such a proposition, though in some instances something very like it has been sanctioned by courts, *cannot be rendered sound, nor even respectable*, by the authority of great names. Of what does property practically consist, but of the incidents which the law has recognized as attached to the title, or *right of property?*" *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, at p. 321.

"The 'taking for public use,' when applied to land, is *not limited to occupation by the public*. Any regulation, which imposes a restriction on the use of the property by its owners, and any neighboring public improvement which tends to impair the enjoyment of property, by affecting some right or *easement* appurtenant thereto, may constitute a public use within the meaning of the Constitution" Re: *Kansas City Ordinance*, 298 Mo. 569, 593, 252 S. W. 404, 408.

"*Anything which destroys or subverts the exclusive right of any person to freely use, enjoy, and dispose of any determinate object, real or personal, constitutes a taking or destruction pro tanto of property, notwithstanding the possession and disposal thereof is not disturbed, and there is no actual or physical invasion of the locus in quo.*" *Prairie Pipe Line Co. v. Shipp*, 305 Mo. 663, 672, 267 S. W. 647.

"*There need not be an actual, physical taking, but any destruction, restriction, or interruption of the common and necessary use and enjoyment of property in a law-*

ful manner may constitute a taking for which compensation must be made to the owner of the property. \* \* \* The term 'taking' should not be limited to the absolute conversion of property; *nor is it material whether the property is removed from the possession of the owner, or in any respect changes hands.*" 20 *Corpus Juris*, pp. 666-668, Sec. 138, and numerous cases cited in footnotes there found.

In an almost identical situation in another floodway as the result of the Flood Control Act of May 15, 1928, in the case of *United States v. Yazoo & M. V. Ry. Co.*, 4 Fed. Supp. 366, the Court correctly stated: "The fact that the existing gaps have not been closed, and that the main levee between the spillway and the river has not been cut, is of no material importance, considering the magnitude of the work. *For all practical purposes the spillway is, and has been since June, 1931, complete and ready for operation whenever the need therefor shall arise. The United States has acquired and taken every right needed for the spillway project, and the property of the respondent has to all intents and purposes been subjected to every possible use contemplated by the taking.*" \* \* \* These facts show a taking within the principles of law applicable and give rise to compensation in favor of the respondent."

In *Kincaid v. United States*, 37 Fed. (2d) 602, involving this identical Boeuf Floodway, as long ago as December 13, 1929, the Court correctly said:

"Of course, the physical occupancy of the ground in this case will not take place until and when it is overflowed by water in time of flood; but the process of subjecting it to that service, and the taking possession in so far as is either necessary or contemplated by the act, will begin with

the construction of the first levee or works which are intended to direct the water upon the land. No other character of possession seems reasonably to have been contemplated in any case where 'flowage rights' or rights-of-way, as distinguished from lands, were to be acquired, than that which flows from the construction of the works. When they will have been completed the appropriation will be complete. *It cannot be that, if the owner is entitled to compensation, he must wait until an overflow comes.* Under the law of this state unqualified ownership of property includes the *usus, fructus and abusus*, or the right to possess, enjoy the fruits, and dispose of the whole in the most unrestricted manner. \* \* \* When either of these is taken away or diminished, *to that extent does the owner lose a part of his property*, or, which is the same, the elements that constitute ownership." 37 Fed. (2d), at p. 608.

"It would be a very curious and unsatisfactory result, if \* \* \* it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, *can inflict irreparable and permanent injury to any extent*, \* \* \* without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as these rights stood at the common law, instead of the government, and make it an authority for *the invasion of private right under the pretext of public good*, which had no warrant in the laws or practices of our ancestors." *Pumpelly v. Green Bay & Miss. Canal Co.*, 13 Wall. 166, 177-178, 20 L. ed. 557, 560; *Lewis, Eminent Domain*, (3d Ed.), p. 66.



Particularly pertinent are the remarks of the Court in *Louisville & N. R. Co. v. Lambert*, 33 Ky. L. R. 199, 110 S. W. 305, where a railroad company, pursuant to a city ordinance erected a wall in the street abutting on lots owned by the plaintiff. Plaintiff had sold two of the lots *before the completion of the wall*. It was contended that the right to recover was in the purchaser of the lots, and not the plaintiff, because he had parted with his title before the wall had been completed. The Court rejected this contention, saying:

"In this case appellant (railroad company) not only had the right to construct the wall, but *was actually engaged in its construction at the time a portion of the property was sold*. The work had progressed to such an extent as to make the construction of the wall reasonably certain. While the injury to the two lots first sold was not complete, the effect was practically the same, and *every person desiring to purchase the lots in question had the right to assume, and did assume, that the wall would be completed*, and as a matter of fact it was completed. The appellee being the owner of the lots when thus injured, we think he was entitled to recover such damages as his property sustained

" \* \* \* If the purchaser of the property had brought suit to recover, the *conclusive answer* would have been that *the property had been permanently damaged in its market value*, if damaged at all, at the time of the purchase. *He bought the property at a reduced price*. He was not damaged, because he got the advantage of the reduction in the price. Who, then, suffered the damage? Manifestly the appellee who sold the property, *for an account of the construction of the wall, he sold it for less than he could have got for it before it was generally known that the wall would be constructed.*" 110 S. W. 307.

So in the case at bar respondent had the perfect legal right to take advantage of the peak prices during the boom elsewhere of 1929, but she was deprived of that right by the Flood Control Act of May 15, 1928, followed by the actual construction of the project which was so far in active progress during the year 1929 as to *then* destroy the market value of respondent's property. Every person desiring to purchase respondent's property *then* had the right to assume, and did assume, that the floodway would be completed, and as a matter of fact it was completed for all practical purposes. Therefore respondent *sustained her actual loss in 1929*. So far as the market value of her property was concerned the taking by the Government was complete in 1929. Therefore respondent's present cause of action was complete in 1929. *Nothing which happened thereafter could destroy that complete cause of action which is now being enforced.*

This all demonstrates that whether or not respondent's property has actually been flooded, or has actually suffered physical invasion by the Government's use of the floodway, is wholly immaterial. She never can recover for any physical damage which results from such actual, physical use of the floodway. There ~~never~~ was a time when she could have recovered for such damages. She seeks no such recovery in the case at bar. She seeks only compensation for a "taking" under the provisions of the Fifth Amendment of the Federal Constitution. Therefore, any evidence of, or reference to, actual physical invasion of respondent's property, *or, the lack thereof*, is entirely beside the point, incompetent, irrelevant and immaterial, tending only to confuse the issue to be adjudicated by this Court. Any argument to the contrary discloses a complete failure to

apprehend the meaning of the word "property" as it is used in the Fifth Amendment.

A practical illustration would be this: Suppose there were enacted in the City of Washington a congressional ordinance authorizing the erection of a *glue factory* in the midst of the most exclusive residential section of Washington, D. C., adorned with the finest homes of the city, occupied by the most fastidious, select citizens. Pursuant to such ordinance, the glue factory is erected, the machinery put in, and the materials assembled for starting the manufacture of glue. These expensive, exclusive homes would immediately lose their market value *before*, and *not after*, the factory actually begins operation. So it is with respondent's property in the case at bar even to a far more serious extent. Respondent rightly seeks to recover that *past* loss of market value which she long ago sustained—a right guaranteed to her by the Constitution of her country.

It is therefore perfectly clear that counsel for petitioner are discussing issues entirely beside the point when they urge that there has not yet been any "physical invasion" because the respondent has not yet been actually drowned by flood waters from the Mississippi River diverted by the Flood Control Act over her land in the Boeuf Basin floodway. They ignore the vital fact that the very fixing and dedication of this floodway by the Government under the terms of the Flood Control Act has invaded certain constituent elements of the respondent's *property*, viz, her UNRESTRICTED right of use, enjoyment and disposal. *Anything* which destroys or subverts any of the essential elements of property hereinbefore mentioned is a "TAK-

ING," or destruction *pro tanto* of respondent's property, though the possession and power of disposal of the land (at its diminished value) remain undisturbed, and "though there be no actual or physical invasion of the locus in quo."

**D. CONSEQUENTIAL DAMAGES.** Petitioner has unsuccessfully attempted to defend every case of "taking" since the early case of *Pampelly v. Green Bay & Miss. Canal Co.*, 13 Wall. 166, 20 L. ed. 557, by pleading that the rights destroyed were merely *consequential damages* for which there can be no recovery. This is the easy way out. There was nothing neoteric in the re-echoing of this sing-song defense when the District Court was induced to erroneously declare: "If the passage of the Flood Control Act creating a general plan of flood control had any depressing effect whatever upon the market value of plaintiff's land, and lands similarly situated, that in itself did not constitute such a damage for which the United States was liable, but if such damage did exist it was of a *consequential* and anticipatory and speculative nature and is *damnum absque injuria* for which the United States is not liable" (R. 373, Par. 17). In its opinion, the District Court stated: "Action on the part of the Government, not directly encroaching upon private property, but which imposes a temporary, occasional or incidental injury, and impairs its use is regarded as a *consequential damage* and does not amount to a taking" (R. 386). The District Court would have been more nearly correct had it added to this statement: Provided such damages were *unintentional* and *not contemplated* by the authorized project.

*Recent authorities* have forever and effectively laid this ghost of "consequential damages"; though the cor-

rect definition and legal concept of the term can be found easily enough in the older decisions. Briefly, consequential damages is an *unexpected damage*, resulting from an act which was *not reasonably contemplated nor intended* by the parties. No informed person will say that respondent's damage was unexpected, unintended, or not contemplated. See Point V, B, 2 hereinbefore.

Consequential damages are usually such as can be avoided by extra expense, warding off the consequences of the act complained of. The very phrase is really self-explanatory. Webster's New International Dictionary defines the term "consequential damages" as being at law: "Those damages which do not arise as an *immediate* or *natural* and *probable* result of the act of the party, but as an incidental result of it. Such damages, as being remote, are generally not recoverable; but *sometimes they may be recovered, as in case of special damages or special statutory provisions.*"

But again, we remind the Court that respondent is not suing to recover any kind of a *damage*, consequential or otherwise. She sues to recover for an actual *loss* of market value resulting from a *taking* of her property, which loss is judicially measured by the difference between the value of her entire property before and after such taking. See Point XI, 3, this brief.

The test as to whether damages are the result of "a taking" of property, for which the United States is liable, or are merely "consequential"—unintentional, unanticipated, not contemplated at the time, incidental and remote, temporary—for which the Government is not liable, is well stated by the Supreme Court in *Manigault v. Springs*,



199 U. S. 473, 26 S. Ct. 127, 50 L. ed. 274, 280, as follows:

"We think *the rule* to be gathered from these cases is that where there is a practical destruction or *material impairment of the value of plaintiff's lands*, there is a taking which demands compensation; but otherwise where, as in this case, plaintiff is *merely put to some extra expense in warding off the consequences of the overflow.*"

By no expense, reasonable or unreasonable, can respondent ward off from her property the consequences of the Flood Control Act. It is a *permanent* condition, or so was considered May 15, 1928, at the time of the taking when compensation was due. The Government floodway has rendered the homes of the property owners therein "unfit for a place of residence" (R. 181). This constitutes "a taking," not a mere incidental damage which can be easily corrected by some expenditure of a reasonable amount of money. *Pennsylvania R. R. Co. v. Angel*, 41 N. J. E. 316, 7 Atl. 432.

The distinction between "consequential damages" and "a taking" is also very clearly and convincingly discussed in the case of *Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 545. In the course of the opinion the Court says: "A damage caused by a breach of contract is often called *consequential* (in the technical sense of being a consequence so remote or unexpected, as not to entitle the sufferer to redress) *when it cannot be reasonably supposed to have been contemplated by the parties*, in making the contract, as likely to be caused by a breach; and in tort, a damage is often called consequential *when it was not a reasonably necessary consequence*, or one so natural and probable that the defendant can be reasonably supposed to have foreseen the likelihood of its being caused by the wrong complained

of. Eaton's damage was not consequential in that sense, for it was reasonably to be expected as a natural consequence of making the cut where it was and as deep as it was, however carefully and skillfully the work might be done, and was equally to be expected whether the cut were made by R. or by the defendants." 54 N. H. 555.

There can be no doubt but that respondent's loss was not only "reasonably to be expected," but was definitely foreseen. The late Judge Martineau, while Governor of Arkansas, testified before the Senate Committee on Commerce relative to the land on the floor of the Boeuf Floodway: "Every man who owns land in these flowage ways recognizes that when it (his land) is placed where it is constantly subjected to an overflow without any protection, that its value, at least for agricultural purposes, is destroyed." (Senate HEARINGS, Flood Control, January 28, 1928, p. 206). There is nothing merely incidental, unanticipated, unintentional, temporary or remotely consequential about the condition of respondent's land caused by the Jadwin Plan.

The rule in the Eighth Circuit has recently been clarified in the following language: "Ordinarily, 'consequential damages' are those which do not arise as an immediate, natural, and probable result of the act done, but arise from the interposition of an additional cause, without which the act done would have produced no harmful result; while 'proximate damages' are those which accrue directly and in natural sequence, and as a specific (hurtful) result from the act done, without the intervention of an independent cause.

"It is not necessary to consider, or rule, whether the damages dealt with in the cases of *Christman v. United*

*States*, (C.C.A.) 74 F. (2d) 112; *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363, and *Sanguinetti v. United States*, 264 U. S. 146, 44 S. Ct. 264, 68 L. ed. 608, do or do not fall precisely within the fairly well-settled definition of consequential damages, for there were in each of these cases, as will be noted in the course of the discussion, so many other questions, which may have been controlling, that the precise nature of the hurt therein is well-nigh irrelevant. But obviously, confusion is found in the cases, and this confusion has seemingly misled learned counsel for appellant. This confusion comes, we think, from a failure to distinguish as to the origin of the independent cause. If the latter arises from the act of another person and so could have been obviated or prevented, or from natural causes acting abnormally, e. g., acts of God, damages arising from the original act are not recoverable, for they are consequential merely, and not proximate. But if the hurtful result shall arise from the original act done, perforce, or plus the normal operation of well-known, uncontrollable and immutable laws of physics and natural forces, we are incapable of either following or agreeing to the distinction.

"It is known that the wind blows; that in certain latitudes and at a certain temperature ice forms, and later melts when the temperature rises; that water will saturate and soften the soil; that flowing streams carry silt, the amounts whereof vary as the square of the velocity, and when the velocity decreases the silt is deposited on the bed of the stream. None of these things was due to the act of any person, nor can any of them be prevented by any reasonable human means. It is merely nature acting as it always has, and always will act. It seems to us that WHEN

**A GIVEN ACT IS SUCH AS TO PUT IN FORCE A NORMAL LAW OF NATURE, WHICH IN CONJUNCTION WITH THE ORIGINAL ACT DONE, PRODUCES A HARMFUL RESULT, SUCH RESULT IS NECESSARILY A PROXIMATE CAUSE OF THE ACT DONE.**

If this is not so, it is difficult to envision any instance of proximate cause; for man does nothing, he has never done anything, nor will he ever do anything, except *move physical objects and then permit nature to take its course*. If these things were not in contemplation of the dam builder, how can it be said then that the dam caused the pool. Man made the pool but nature filled it with water, because nature makes water run downhill, and pile up when it meets an obstacle to its downward flow." *United States v. Chicago, B. & Q. R. Co.*, 82 Fed. (2d) 131, at pp. 136-137, 106 A. L. R. 942.

All of the authorities herein cited on the question of "taking" completely refute this theory that escape from liability lies in the confusing plea of consequential damages. The cry of "consequential damages" in this case misses the mark entirely. It is significant only as being the hackneyed distress call of helplessness and a fatal admission of weak defenselessness.

"When the 5th Amendment of the Constitution of the United States declares that: 'Private property shall not be *taken* for public use without just compensation' a compact or contract of the highest degree of obligation is thereby established between the American people of the one part and each and every citizen of the other part. In and by that constitutional provision every citizen agrees that his property may be taken for public use whenever

the nation, through its legislative department, demands it; and the United States agree that, *when the property of the citizen is so taken, just compensation shall be made.*" Mr. Justice Shiras in *Hill v. United States*, 149 U. S. 593, 600, 13 S. Ct. 1011, 37 L. ed. 862, at p. 864.

The Circuit Court of Appeals was entirely right in ignoring this specious contention of petitioner's perplexed counsel anent "consequential damages."

**E. STATUTE OF LIMITATION.** No statute of limitations is involved in the instant case, and would not be mentioned but for the fact that counsel for petitioner threaten the Court with dire disaster to the Government should respondent succeed in securing justice for herself in this action. In their Petition for Certiorari (pp. 23-24) counsel state: "The present proceeding is a test case to determine whether the United States had 'taken' the lands located in the Boeuf floodway. It is highly important, therefore, that the correct result be reached, since that floodway is over 125 miles long and about 15 miles wide."

We concede that it is highly important that a correct result be reached, but this would be true even if respondent's little 40 acres of land alone was involved. The protection of the constitutional rights of America's humblest citizen is indeed of supreme importance to the Nation. The fact that the floodway may be over 125 miles long and about 15 miles wide is wholly immaterial, and throws no light whatever upon the legal rights of the respondent now submitted to this Court for adjudication.

Nevertheless, it is only fair to call the Court's attention to the fact that with the exception of the few small



suits still pending in the District Court and the comparatively few cases which were filed in time in the Court of Claims (R. 217-219 Petition for Certiorari, this case, p. 24), all other property owners in the Boeuf Floodway are now barred from suits against the United States under the Tucker Act. The witness Mr. Hopson was correct in testifying: "I think such claims are now barred by the statute of limitation" (R. 191).

"No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought *within six years after the right accrued* for which the claim is made." (Tucker Act, Title 28, U.S.C.A., Sec. 41 (20), p. 626.)

Therefore, no new suit can now be successfully filed against the United States because of the taking of the Boeuf Floodway; and this has been true since January 10, 1935, six years after the original taking on January 10, 1929. See Point V, B. 4, d, of this brief.

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## POINT VI.

***Boeuf Spillway Has NOT Been Abandoned.***

The most inexplicable error of the District Court is its startling assertion that not only did "the Government not proceed with the construction of the Boeuf Floodway" (R. 380), and "consequently, that floodway is not now and never has been in an operative condition" (R. 388), but, on the contrary, *the Boeuf Spillway has been abandoned* (R. 371, Par. 11; R. 361, Par. 31; R. 358, Par. 26). With equal truth, we very respectfully submit, it may be calmly asserted that the sun has ceased to shine.

The District Court erred in refusing respondent's requested Conclusion of Law which correctly declares: "The Flood Control Act of June 15, 1936, has no effect upon the petitioner's cause of action; except that section 2 of said Act is an express admission by the United States that the Boeuf Floodway is in operative condition, and that the United States will continue to hold its right to flood petitioner's property for an indefinite period of time in the future as contemplated by the Flood Control Act of May 15, 1928. Section 2 of the Flood Control Act of June 15, 1936, is a ratification and confirmation of the taking of petitioner's property as is alleged in this action" (R. 347, Par. 51). See R. 85-86.

1. In the first place, all testimony relative to the proposed Markham Plan of the Flood Control Act of June 15, 1936, was *incompetent*, and the District Court erred in the admission of this testimony (R. 239-240 and 287). Respondent's property was taken January 10, 1929, or very soon thereafter. Respondent's cause of action had then

accrued. Respondent was *then* constitutionally entitled to the value of the servitude or easement taken paid *contemporaneously* in money. No fact or element resulting subsequent to this taking can be legally considered. *Olson v. United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236, 1237, 1245, and cases there cited. No fact or event not in existence at the time of the taking could have possibly been contemplated by the parties. Any such unforeseen, unanticipated contingency would be of the consequential nature of which the Courts take no note. This cause must be tried as of the day of the taking, or certainly not later than as of the date the suit was filed on August 11, 1934 (R. 16).

When respondent's land was taken she was *immediately* due compensation by the Government. Any later change in attitude by the Government would be wholly ineffective to destroy respondent's right of action which had accrued at the time of the taking. The records of the Court of Claims are full of decisions at the conclusion of the World War illustrating this point. The United States was uniformly required to pay compensation for property taken *but abandoned without use* at the conclusion of the war. The failure of the Government to use the property so taken was of no concern to the owner whose property had been taken. So here.

2. *The Facts.* But all such discussion in the case at bar is purely academic. THE BOEUF FLOODWAY HAS NOT IN FACT BEEN ABANDONED. Everyone familiar with the facts knows better. There is actually at present no substantial market value for property on the floor of this floodway because of the inescapable physical

fact that the Boeuf Spillway (the fuse plug levee) is still ready for use at any time it is needed under the Jadwin Plan, and has been so ready for many years. There is no assurance that this situation will ever be changed.

The Congress of the United States is perfectly frank about the matter. *Long after* the filing of respondent's suit, the Congress expressly admitted the Government's easement and asserted its right to flood respondent's property at will under the provisions of the 1928 Act, and definitely declared the intention of the United States to continue that use indefinitely. Section 2 of the Flood Control Act of June 15, 1936, reads as follows:

"Sec. 2. That the Boeuf Floodway, authorized by the provisions adopted in the Flood Control Act of May 15, 1928, shall be abandoned, *as soon as the Eudora Floodway, provided for in Flood Control Committee Document Numbered 1, Seventy-fourth Congress, first session, is in operative condition and the back-protection levee recommended in said document, extending north from the head of the Eudora Floodway, shall have been constructed*" (R. 154).

The words "*shall be . . . as soon as . . . shall have been constructed*" refer to the future. Congress does not pretend to say that the Boeuf Floodway has as yet been abandoned. As a physical fact the Boeuf Floodway cannot be abandoned until a physical levee has been constructed across its mouth which will be respected by the violent flood waters of the Mississippi River. The Boeuf Floodway cannot be abandoned by a mere edict of Congress any more than old King Canute could stop the flood tides of the ocean on the beach by mere command. The Congress of the United States has undertaken no such fool-

ish and dishonest escape from liability in the present action. On the contrary, the United States is admitting, definitely, expressly and explicitly, by the language of section 2 of the Flood Control Act of June 15, 1936, that *the Boeuf Floodway is now in operative condition as intended* (see Point III), and will continue in such operative condition until the Eudora Floodway has been constructed, and until the mouth of the Boeuf Floodway has been physically closed by the back-protection levee recommended.

Even if that construction work should ever begin it would take many years for completion. As a matter of fact, *no informed person now expects the Eudora Floodway as authorized by the Flood Control Act of June 15, 1936, ever to be constructed.* In view, then, of section 2 above quoted, by what authority can anyone say that the Boeuf Floodway has been abandoned? Who abandoned it? How was it abandoned? When was it abandoned?

Judge Cooley once said: "Courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon." *Heard v. Farmers Bank of Hardy*, 174 Ark. 194, at p. 206, 295 S. W. 38.

Even while this case was pending in the Circuit Court of Appeals the press of the country carried in bold headlines announcement that the **EUDORA FLOODWAY HAS BEEN ABANDONED.** The Flood Control Act of June 15, 1936, was not to become operative as to the Eudora Floodway, and the north extension involving respondent's property (the Markham Plan), unless and until 75% of the necessary flowage rights for *all the floodways* could be



acquired by voluntary purchase for not exceeding \$20,000,000 (Sec. 12; R. 154-155). This *condition precedent* has not occurred, and at Hearings before the Senate Commerce Subcommittee in Washington on March 28, 1938, and the House Flood Control Committee on March 30, 1938, it was admitted by all witnesses that the Secretary of War can *never* comply with this condition precedent. **THE EUDORA FLOODWAY IS DEAD.** It now appears that the *Boeuf Floodway* may *live forever*. At least that is the present situation; and certainly there was no suggestion to the contrary when respondent's suit was filed. The "Markham Plan" had not then even been conceived.

On March 30, 1938, Maj. Gen. Schley, the present Chief of Engineers, testified: "The engineering plans for the lower Mississippi heretofore recommended and adopted are fundamentally sound. \* \* \* *The provision for the escape of extraordinary flood waters into floodways is necessary.* The desirability of not having dwellings in floodways has already been demonstrated, which points to the need for authority to obtain some lands in fee. Due to a number of *insurmountable conditions*, it has *not been possible* for the department to initiate the construction of either the Morganza or *Eudora floodways.*" \* \* \* *The fuse plug levee was left at its lower height for the purpose of blowing if you had a flood in excess of the present levee capacity of the main river.* "That was the original purpose and goes back as far as the report of 1928, the Jadwin report. *That still remains with its original function.* There has really been *no change* with respect to that until the Eudora Floodway should be constructed." (HEARINGS, House Committee on Flood Control, March 30, 1938, at pp. 6, 9, 10, 17, 18 and 20).

When the fuse plug levee shall have been built up to the 1928 grade and section, equal in height, size and strength to the levees on the opposite side of the river, or when such a levee is in physical existence across the entire mouth or entrance of the Boeuf Floodway, thus effectually closing that mouth against diversions from the main channel of the Mississippi River, then, and **THEN ONLY** will the Boeuf Floodway be, in fact, abandoned.

In irreconcilable conflict with their superior officers and the composite official judgment of the Corps of Engineers, the underling expert hired-hands produced by petitioner to testify in the District Court gave it as their personal opinion (R. 251, 262), that the fuse plug levee could have easily carried a combination of the 1937 flood out of the Ohio River and the 1927 flood out of the Arkansas and White Rivers (Mathes, R. 245). The falsity of this conclusion is easily demonstrated with mathematical precision by using their own figures. Forgetting for the moment that a synchronization of known record floods at the mouth of the Arkansas River would aggregate 4,399,000 cubic second-feet of water (R. 162), we know that the crest discharge of the 1937 flood along the fuse plug levee was only 2,150,000 cubic feet per second, which left a free board above water along the fuse plug levee of only 4 feet (Morris, R. 254). The Mississippi River Commission insists there should always be a free-board of five (5) feet for safety. (HEARINGS, House Committee on Flood Control, March 30, 1938, at p. 55—Gen'l. Ferguson, President of Mississippi River Commission.)

"Approximately 2,000,000 cubic second-feet of water came out of the Ohio River to the mouth of the White and

Arkansas Rivers in 1937" (Mathes, R. 245). "When the crest of the 1937 flood reached the mouths of the Arkansas and White Rivers the discharge from those rivers was 100,000 cubic feet as compared with 1,200,000 cubic feet in 1927" (Clemens, R. 263). Thus a synchronization of the 1927 flood (1,200,000) and the 1937 flood (2,000,000) would have produced a total discharge of 3,200,000 cubic second-feet of water along the fuse plug levee (R. 245). As a matter of fact the total discharge in 1937 was only 2,150,000 (R. 254), or 1,050,000 cubic second-feet less than would have been true had a 1927 flood been coming out of the Arkansas River in 1937.

By actual measurement, as shown by the official discharge rating curve graph during the 1937 flood for each additional 52,000 cubic second-feet of water the gage was raised at Arkansas City 1 foot (R. 285, 279). Therefore, dividing this 1,050,000 c.s.f. by 52,000 proves mathematically that if a 1927 discharge from the Arkansas and White Rivers had been added to the 1937 discharge from the upper river at their mouths, the water along the fuse plug levee would have been more than 20 feet higher, or at least 16 feet above the top of the fuse plug levee. As is pointed out by Mr. Neptune: "In order for the fuse plug levee to have safely carried such a flood, with the customary freeboard, it must have been 17½ to 18½ feet higher than it now is" (R. 278).

No wonder these same Government witnesses were forced to admit the continued necessity of the floodway (R. 250) notwithstanding all their theoretical, speculative enthusiasm for the cut-offs. It is significant that not a single one of petitioner's witnesses dared advocate the

building up of the fuse plug levee to equal grade and section with the levees across the river in Mississippi and to the north and south of the fuse plug—the only physical fact which would give respondent equal protection with her neighbors. See R. 327-328, Par's. 83, 84.

It is no secret that for a number of years the Army Engineers have been waiting the outcome of this test suit (R. 217-219) before constructing the guide or protection levees limiting the floor of the Boeuf Floodway. The recommendation February 28, 1931, was: "that the construction of the side or protection levees in the Boeuf and Atchafalaya basins be *deferred, until the question of damages to lands and property* between these levees has been determined by the courts" (Doc. 798, p. 13, R. 138). "The protection levees are not at all essential to the proper functioning of the plan in the adopted project, but were included merely to furnish local protection or reclamation" (Doc. 798, p. 47, R. 139).

The Boeuf Floodway was definitely ratified in 1931. It was then recommended: "That *no change* be made in the project"—the Jadwin Plan (R. 140).

In 1931, the escape of flood waters through the Boeuf Basin was still "an essential feature of any economically feasible plan for the control of floods in the lower Mississippi Valley. The restriction of flow by means of side or protection levees in these basins is not essential to the escape of the flood waters but is advisable for the protection of certain lands, and for the protection of life and property, where the cost is not excessive" (Doc. 798, p. 26, R. 138).

In 1936, long *after* the filing of respondent's suit, Chief of Engineers Markham was still assuring the Congress of the United States that, notwithstanding all subsequent developments, the Boeuf Floodway was still *essential*. In answer to the direct question: "Can floods in the lower Mississippi Valley be controlled successfully without the construction of either the Boeuf or the Eudora Floodways?" General Markham answered emphatically: "*They cannot be*" (R. 148).

In 1938, even while this case was in the Circuit Court of Appeals, the present Chief of Engineers, Maj. Gen. Julian L. Schley, was still insisting to the Congress that a floodway south of the Arkansas River, to the west of the main channel of the Mississippi River, is an *engineering necessity*. He states definitely that something in the magnitude of a million cubic second-feet "*must* be diverted in that middle section if that area is to have security and protection" (HEARINGS before Senate Commerce Committee on S. 3354, March 28, 1938, p. 33). At the same time the President of the Mississippi River Commission, Brig. Gen. Harley B. Ferguson, concurred in the statement: "The engineers regard the construction of a diversion channel in the vicinity of the Boeuf as *still essential* for the protection of that territory" (Senate HEARINGS on S. 3354, March 28, 1938, p. 39). The Chief of Engineers further stated as true: "*As it now stands YOU HAVE the floodway authorized, and it is the controlling project now until the Eudora and Morganza Floodways are built*" (Senate HEARINGS on S. 3354, March 28, 1938, p. 28). "Last year our problem was *not to let more water into the lower river than it could carry*. Therefore, we have had to be *always ready to let the excess water above the river's*



*capacity escape at the low levee as authorized in the 1928 law*" (Gen. Ferguson, HEARINGS, March 28, 1938, p. 40).

Again may we ask *who* abandoned the Boeuf Floodway, and *when*? All public records on the point *definitely* and *expressly* refute the suggestion.

Both Gen. Schley and Gen. Ferguson then frankly admitted that it was improbable that the Eudora Floodway would ever be constructed. "*We have not been able to make much progress there.*" Over 60% of the property owners have refused to give options. "*There is no prospect of obtaining a sufficient number of options in the Eudora within the near future.*" We have "encountered a difficulty that looks like it is *insurmountable* in getting 75% of them." "*We cannot go into a State and do anything that is absolutely opposed by everybody you come in contact with.*" \* \* \* Some method of escape west of the river is necessary." (Senate HEARINGS, March 28, 1938, pp. 37, 38, 41, 45).

On March 22, 1939, *after* the decision of the Circuit Court of Appeals in this case, the Chief of Engineers still publicly admitted that no progress had been made on the Eudora Floodway. He said: "*With the single exception of the Eudora Floodway, noteworthy progress has been made on all important features of the comprehensive plan for the lower Mississippi River, including items added or affected by the 1936 and 1938 acts, and main river work has been performed where needed most*" (Congressional Record of March 22, 1939, Appendix, p. 4415).

After trying for a year to secure flowage rights on the floor of the proposed Eudora Floodway, all further

efforts on the part of the Army Engineers to secure options for these flowage rights in the Eudora were "suspended in May, 1938" (Report of the Chief of Engineers, U. S. Army, 1938, House Doc. No. 6, 76th Congress, 1st Session, Part 1, Vol. 2, at pp. 2016 and 2043).

Thus endeth petitioner's dream of the Eudora floodway.

"Not only is the Eudora Floodway not in operative condition, but its ultimate construction is now regarded as extremely doubtful, owing to apparently irreconcilable disagreements between the government and local authorities over the terms of acquiring flowage easements." *Sponenbarger v. United States*, 101 F. (2d) 506, at p. 512.

All the foregoing is strictly in accord with the official record in this case, which is of itself amply sufficient and conclusive to fully expose the basic error under discussion. The Markham Plan is a phantom that will never materialize for a defense in this case. (If ever constructed, the Markham Plan—the northern extension of the Eudora Floodway—would still cover respondent's land.)

"*The Jadwin Plan as adopted by the Flood Control Act of 1928, has not yet been actually, physically changed.* There has been no appropriation for the mere authorization of the Overton Bill. The plan of the Overton Bill (Markham Plan of the Act of June 15, 1936), cannot, by its own terms, become effective until flowage rights have been acquired within a definite limit and that has not yet been done. *The only plan under actual construction is that authorized by the Flood Control Act of May 15, 1928. That is the actual, physical plan which is on the ground.* (Petitioner's chief engineer expert, Mathes, R. 247.)

"This plan as described in sections 117 and 118 of Document 90 has not been changed, but *is still the plan at the present time.* \* \* \* The escape of flood waters through the Boeuf Basin is, and for a number of years has been, *an essential feature of this Jadwin Plan which is in operation*" (Mathes, R. 247-248).

"My interpretation of Section 2 of the Overton Bill (Flood Control Act of June 15, 1936) is *the Boeuf Floodway plan will still be in operation.* \* \* \* That stretch of low levee at the head of the Boeuf Floodway, designated as *a fuse plug, is to continue just as it has been left since 1928. There is no change to that section of the levee in the new law. It is left at the 1914 grade*" (petitioner's expert engineer witness Seybold, R. 258).

"*There has been no preparation to carry out the construction authorized by the Overton Bill. Very few flowage rights required by the Overton Bill have been acquired so far. The Markham Plan, authorized by the Overton Bill, is so far, nothing but a paper plan, an optional plan. I cannot say whether or not it will ever be executed. Even the details of the plan have not yet been worked out, much less approved by the higher authorities*" (Seybold, R. 258).

"*The Flood Control Act of June 15, 1936, the Overton Act authorizing the Markham Plan, leaves this fuse plug levee along the main channel of the river at the 1914 grade just as it is under the Jadwin Plan of the 1928 Act. It is not to be raised. The fuse plug is to be strengthened. \* \* \* When the water reaches a stage of 60.5, the fuse plug levee is intended to be overtopped, and to crevasse under either plan. The plaintiff's land is in the floodway under*

either plan, and it doesn't make any difference which is used, and would be by the same fuse plug levee" (Mathes, R. 246).

"If the fuse plug levee is left as it is, a *potential floodway* is still there with a possibility of its use *every season* under the present plan \* \* \*. Its function is to be used at any time sufficient flood water comes down the river" (Mathes, R. 246).

How then can counsel justify their effort to mislead the Court into basing a decision on the false assumption that the Boeuf Floodway has been abandoned? What a cruel mookery of respondent! How indefensible a miscarriage of justice! "*Falsus in uno, falsus in omnibus*" seems to be the ancient proverb most apposite. Anent petitioner's plea of "*speculative damages*," certainly nothing could be more *speculative* than its proffered defense of the proposed Markham Plan.

Clearly the compensation awarded respondent on this appeal must be based only on the provisions of the Jadwin Plan. See Point XI of this brief.

The lower Court erred in refusing respondent's requested Conclusions of Law Nos. 36 (R. 341), 50 (R. 347), and 52 (R. 347).

Only judgment for respondent in this Court, can replace with judicial illumination and justice the obscurity and gloom of error found in the record of the District Court. Both Facts and Law plead for respondent, and we throw not in vain.

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## POINT VII.

**CUT-OFFS. Irrelevant, Incompetent, Immaterial . (R. 239-240, 287).**

Petitioner undertook in the District Court to build practically all its substantial evidence around a program of "cut-offs" initiated by the Government a number of years *after* respondent's land had been taken for a flood-way. This cutting through a number of large loops in the main channel shortened the river approximately 100 miles.

The District Court erred in refusing to adopt respondent's requested Finding of Fact No. 85 (R. 328-329).

The District Court erred in refusing respondent's requested Conclusions of Law Nos. 36 (R. 341-342), 50 (R. 347) 53 and 54 (R. 348); and erred in declaring petitioner's requested Conclusion of Law No. 4, (R. 369).

The Court will note at once that the "cut-offs" involved in the testimony constitute *no defense* at all to the alleged taking. At most such testimony could only tend to mitigate damages. They are not pleaded in defense (R. 240-241). The entire testimony on which petitioner relies on this point should be stricken from the record and from consideration because it is irrelevant, incompetent and immaterial (R. 287). These cut-offs were (1) not authorized by the Flood Control Act of May 15, 1928, (2) were not contemplated by the parties at the time of the alleged taking, and (3) are not now and have never been effective even to ameliorate respondent's loss.

1. Nothing can be more certain than that the cut-offs involved in the testimony in this case were *not* authorized



as a part of the Jadwin Plan. On the contrary, they were considered and *definitely rejected*. Cut-offs are not listed in Sec. 3, Doc. 90 (R. 119) which does purport to itemize the essential features of the Jadwin Plan. On the contrary, cut-offs are specifically considered in Secs. 69, 70 and 71 of Document 90, and are there expressly and explicitly *rejected* as being a "method too uncertain and threatening to warrant adoption" (R. 246-247).

The Mississippi River Commission reported to Congress: "Cut-offs produce reductions in river length that are *only temporary* unless the river banks above and below the cut-off have been specifically prepared for the change in slope and velocity of the river. \* \* \* Excessive velocities would continue for a long period until the bed of the river had adjusted itself to the new conditions, *something that would never be wholly achieved*" (Special Report of Mississippi River Commission, November 28, 1927, pp. 78-79, Secs. 341-342).

In his report to the Secretary of War for the Congress on February 28, 1931, the Chief of Engineers again *definitely rejected* cut-offs as not being safe as a part of the flood control program (House Document 798, Vol. 1, p. 6, Sec. 3-b—Exhibit 12-b, R. 137).

Petitioner's engineering witnesses seek to justify cut-offs, and find authority therefor, as a part of "channel stabilization" (R. 241, 244, 247). But Document 90 itself defines its own use of the words "channel stabilization" as being "a general bank-protection scheme" consisting "of *revetting banks*" (Doc. 90, Sec. 131, R. 125; also R. 244). The purpose of the Jadwin Plan, and the very meaning of the words *channel stabilization*, is to make the river

*stable* as is expressly stated in Sec. 131, Doc. 90; but no new method of treatment is authorized except that which will "accomplish the same result" (Doc. 90, Sec. 131, R. 244)—that is, make the river more stable. The cut-off program has definitely *unstabilized* the channel and has actually discarded more than 100 miles of river channel (R. 244). Even petitioner's chief witness Mathes is forced to admit: "There is no statement in House Document 90 that I know of authorizing that effect" (R. 244).

2. Even more certain is it that the speculative effects of cut-offs were not within the contemplation of the parties at the time of the taking of respondent's property because they had not then even reached the point of mental conception. General Ferguson, the present President of the Mississippi River Commission, is properly accredited with being the father of the recent cut-off program, and he did not become President of the Mississippi River Commission until 1932 (R. 265). The first cut-off was opened in 1933 (R. 238-239). Petitioner's own witnesses frankly admitted: "*These cut-offs of which I have testified were not contemplated when the Flood Control Act of May 15, 1928, was passed.* For approximately 50 years the policy of the Mississippi River Commission was as recited in Sec. 69 of Document 90. For about 50 years instead of making cut-offs, the Mississippi River Commission built dikes in these loops in the river *to prevent natural cut-offs* because they thought they were dangerous. That policy was changed by the Army Engineers some time *after February 28, 1931*" (R. 247, 248).

How then can counsel have the temerity to argue that cut-offs were a part of the Flood Control Plan authorized by the Act of May 15, 1928?

The District Court erred in refusing respondent's requested Conclusion of Law No. 54 which correctly declares: "As a matter of law, said system of cut-offs was neither contemplated or authorized by the Flood Control Act of May 15, 1928" (R. 348).

Respondent's compensation must be based solely on the Jadwin Plan. See Point XI, 3, of this brief.

3. Furthermore, the cut-off experimentation has not been effective in ameliorating respondent's loss to the slightest degree.

The strategy of the Army Engineers in building their entire defense upon the theory, being developed even during the actual trial in the District Court of respondent's case (R. 262), that recent experimentation in cut-offs has destroyed respondent's right of action is typical of "the expert, professional mind." Doubtless this highly speculative suggestion of technical theories appealed to petitioner's professional witnesses because it injected into the case much room for indeterminate and inconclusive argument as to damages sustained, and a vast amount of confusion as to the vital issues involved. But this strategy must be doomed to complete failure as a defense to the fundamental issue of whether or not there has been a "taking" of respondent's property. Apparently the "taking" is theoretically conceded by being ignored. Therefore *liability* remains regardless of what the Court may think as to the value of the cut-off testimony offered in mitigation of damages. Petitioner's testimony indicates that no other defense was available. The Army Engineers may be, as they confess, the best *engineers* in the world, but, we submit, they utterly fail to qualify as safe constitu-

tional lawyers. Their artifice, or trick in war, is deceiving. The Army seems to have a typical military surprise attack in the use of "cut-off bombs." To the judicial mind this deceptive device can only disclose a total miscomprehension of the legal principles involved in this case. We trust this effort to outsmart with theory and overwhelm with technical statistics and incomprehensible data and confusing exhibits will be futile when confronted with the constitutional rights of a humble citizen of the United States. Respondent's actual loss still stands to be remedied.

The implications intended by petitioner's engineering testimony, as we understand, are their contentions that the belated, unauthorized, experimental cut-offs have increased the discharge capacity of the main channel and thus lowered water levels in the latitude of respondent's property, especially when the water in the river is below dangerous flood levels, thus minimizing the danger to respondent's property. These engineers base their conclusions upon the experience of one flood (1937) and file many charts intended to show that during that flood there was an increased discharge capacity of the main channel of the river, which carried the dangerous, destructive flood crests further down stream than the latitude of respondent's property. What will happen when the cut-off immediately above respondent's property is completed (R. 262), no man can tell. Nor is this 1937 variation unusual (R. 271-276; 255-257).

These points might give the Court concern (a) *IF* the cut-offs had been authorized by the Flood Control Act of May 15, 1928, and (b) *IF* the suggested results had been

true at the time of the taking, and (c) *IF* those claimed results were reasonably both *certain* and *permanent*, and (d) *IF* those authorized results had been generally known at the time of the taking of respondent's property so as to have been contemplated at the time she was entitled to her "just compensation," and (e) *IF* these results had prevented the actual loss of market value which respondent's property has sustained. If all of these "IF'S" could be eliminated, the amount of appellant's recovery might be reduced, but certainly *not defeated*.

However, these suggested implications and astonishing conclusions of petitioner's engineering witnesses, subordinate employees, are irreconcilably inconsistent with the public declarations of those authorized to speak for the United States when appealing to Congress for appropriations and constructive legislation. The failure of petitioner to give this Court the benefit of the direct testimony of the Chief of Engineers and of the President of the Mississippi River Commission on the value of cut-offs is significant and without justification. Those authorized spokesmen for the Government have repeatedly committed themselves and the United States in direct contradiction to the contentions of these subordinates seeking by their testimony to defeat justice in the trial of the lawsuit.

As late as April, 1935, long after the filing of respondent's suit, the President of the Mississippi River Commission testified to the Congress: "*We have never claimed that they (cut-offs) would do anything to floods at all.*" (HEARINGS, House Committee on Flood Control, April 1-13, 1935, p. 681; R. 249).



At the same time the District Engineer in charge of the Vicksburg office was telling Congress: No prudent person would build a home in the floodway. The flood hazard in the floodway is continuous. In order to avoid the hazard and danger that the spillway creates people would have to build their houses upon stilts 20 feet high (House HEARINGS, April 1-13, 1935, pp. 132-133, 148).

Every Chief of Engineers since 1927 *to the present moment* has continued to state emphatically and repeatedly on every proper occasion that the result of the cut-offs has not altered the composite view of the Corps of Engineers as to the necessity of the floodway in this Middle Section. See Points II and III of this brief.

In fact, *immediately before* the trial in the District Court, with all the information resulting from the operation of the cut-offs during the 1937 flood, the President of the United States was assuring the Congress that instead of the 1937 Ohio flood tending to mitigate respondent's damage, and in spite of everything that had been accomplished by the cut-off experiments, the damage to property in the floodways used during the 1937 flood was so much greater than the Army Engineers had anticipated that the Chief of Engineers was recommending "securing fee-simple title to floodways on the Mississippi River." The President stated April 28, 1937: "It occurs to me that, in view of the history of previous legislation and its results, *this is advisable* in order that no questions may arise if it is found necessary to flood these lands. At the same time, it may be well to consider the possibility of renting these lands, once fee-simple title is acquired, to neighboring farmers, with the definite understanding that

*tillage of these lands is solely at the risk of the individual renting them*" (Com. Doc. No. 1, 75th Congress, 1st Session, p. III).

Flatly contradicting the *opinions* and conclusions of petitioner's witnesses in this case, the Chief of Engineers was of the opinion that since so much more water came out of the Ohio River in 1937 than had ever come before, it completely upset all former assurances of safety under the Jadwin Plan. General Markham realized that the Boeuf Floodway lands were saved *only* by the absence of water in the upper Mississippi and in the Arkansas and White River basins. He officially states: "In January, 1937, long-continued heavy rains in the basin of the Ohio River \* \* \* produced a flood of unprecedented magnitude. The river rose to a height of 80 above low water at Cincinnati, being nearly 9 feet above any flood heretofore of record. The resulting damage was enormous.

"Although the discharge out of the Ohio reached a record maximum of 1,950,000 cubic feet per second, *the Mississippi above Cairo was at a low stage in January and February and added little to this discharge. \* \* \* The Arkansas and White Rivers were not in high discharges, so that it was not necessary to make use of the floodways below their confluence*" (Com. Doc. No. 1, 75th Congress, 1st Session, p. 3, Secs. 8, 9).

Does General Markham, the then Chief of Engineers, think that the cut-offs have lessened the flood hazard to respondent's property? *He does not.* On the contrary, he deems the use of the floodways more imperative than ever, and has become convinced that the Government

should buy the outright title to the lands on the floor of the floodway. He assured the Congress, and this Court:

"The experience of the recent flood points to the need for certain modifications in the provisions of the authorized project for the flood control of the Alluvial Valley. The *most important* of these relates to the acquisition of lands in the floodways. *FLOODWAYS for the escape of waters in excess of the capacity of the leveed channel ARE ESSENTIAL if the levees are not to be crevassed in great floods.* The reservoirs set up in this report may reduce, to some degree, the frequency with which they must be used, but *the floodways will still be requisite* to assure the safety of the areas to be protected. \* \* \* As a result of recent experience in the Birds Point-New Madrid Floodway, I am now of the opinion, that *no plan is satisfactory which is based upon deliberately turning flood waters upon the homes and property of people, even though the right to do so may have been paid for in advance. I believe that all lands within the floodways proper for which the purchase of flowage easements is now authorized should be secured by the United States in fee simple, and their future use limited to purposes not in conflict with our requirement as floodways*" (Com. Doc. No. 1, 75th Congress, 1st session, p. 10, Sec. 32).

Does this public declaration of official policy, from an *authoritative source*, in fact the very official charged with the duty of constructing all of the Government flood-control works (Sec. 1 of Act of 1928), tend to diminish respondent's loss of the market value of her property? Rather does it not completely annihilate the technical defense of cut-offs tendered in this case?

Furthermore, with devastating effect on the testimony of petitioner's underling witnesses, the Chief of Engineers amplified and emphasized his formal report just referred to by testifying before the House Committee on Flood Control on June 8, 1937. *After the trial in the District Court*, with full knowledge of all that the cut-off program had accomplished, the Chief of Engineers was defending his recommendation that the United States buy outright the fee simple title to the lands constituting the floor of these floodways. Not only did the Chief of Engineers unequivocally and emphatically insist that respondent's property on the floor of the Boeuf Floodway is still subject to the same continuing flood menace which destroyed its market value years ago, and that the flood hazard as described in the Jadwin Plan will continue for an indefinite length of time in the future notwithstanding the "cut-off" developments and in spite of all the reservoir construction of which enthusiastic theorists have dreamed, but he frankly admitted, and warned the Congress, that the 1937 flood experiences justified even greater alarm for the future than the Corps of Engineers had anticipated in the past. He testified:

"Two major things" (not cut-offs) have developed causing my recommendation that the lands be acquired in fee instead of acquiring flowage rights.

"As we saw the necessity for diverting flood water down the New Madrid floodway we tried for a number of days to be prepared. Holding off as long as we dared but recognizing the approaching crisis for Cairo, we found that it was approximately impossible to get people out of the path of the water. So the matter came finally toward a dramatic climax, with our telephoning, as we did nightly to the Memphis office, *having to insist ultimately that that*

*levee be blown, regardless of the fact that 125 people were known to be in the New Madrid floodway. It was a rather desperate situation. We did not know whether it was 125 or 425, definitely, but there were at least 125, but we had to open the floodway. We did not want to pour great volumes of water upon people who were trapped in a floodway. Yet we felt at the time that that was the only thing we could do. And it was done between midnight and the following morning at daylight.*

*"Again, in trying to keep up with the prospects of getting flowage in the Eudora and Morganza floodways at what the law calls reasonable rates, we become highly doubtful that we were going to get flowage at very much less than the fee cost. \* \* \* I concluded that as between the two considerations, the Government was probably better off to buy the fee than to attempt to secure the flowage. On the other hand, I am perfectly frank to say I do not like it, because last year my thought was that no such acreage of land should be condemned and put out of cultivation, or should be obstructed other than to have some sort of a flowage easement whereby the State would still have the production of those lands, with the tax values that related to them, with the people finding the means of granting flowage and still protecting themselves against being flooded by these vast volumes of water, which, in the Eudora, if the superflood comes, would mean levees to take a million cubic feet of water to flow down at a depth of approximately 20 feet. \* \* \* If we do not have a floodway we may have to turn a million cubic feet of water onto a number of thousands of people. \* \* \* The difficulty is this, that here comes water down from the upper river, as to which, if nothing happened down in the Arkansas and White Rivers, we can pretty*



closely know what the Vicksburg or any other gage is likely to be; but if we have a cloud burst, or a tremendous rainfall on the Arkansas and White, we might have to change our minds in a great hurry, so that there might possibly be little notice down there in those floodways" (House HEARINGS, June 7-11, 1937, pp. 57-59).

"I think that the operation of these floodways is absolutely unavoidable." It would probably take 40 or 50 years to complete the reservoirs recommended even if they were authorized and the money was available (House HEARINGS, June 7-11, 1937, pp. 59, 66).

"It might well be that in the floodway the people would have their homes on the sides, or that they would use tentage instead of permanent buildings. If we took over the property, or acquired the fee, I think we would definitely prevent permanent structures being built in the floodway. It is to be presumed that there would be no property that would tie the occupants down particularly in the floodway. Stock raising would be permitted at their own risk. People in the valley themselves say that they will never consent to the purchase by the United States of the fee" (Gen. Markham, House HEARINGS, June 8, 1937, pp. 70, 64).

*Secretary of War.* The various flood control acts of Congress have authoritatively designated the Secretary of War as the official spokesman of the United States of last resort. In complete demolition of the theory of petitioner's underling engineers, after the trial of this case in the District Court, with full knowledge of everything which the 1937 flood had proved in connection with the "cut-off" experiments, the Secretary of War, voicing the composite opinion of the entire Corps of Engineers, assured the Con-

gress: "The flood (1937 Ohio Valley flood) demonstrated the need for the *IMMEDIATE COMPLETION OF THE AUTHORIZED FLOODWAYS* in the lower Mississippi River project. It further demonstrated the need for reservoirs to impound flood waters and thus provide an additional factor of safety for the lower valley, \* \* \*" (Secretary of War Woodring, House HEARINGS, June 7-11, 1937, pp. 16-17).

Even while the case was pending in the Circuit Court of Appeals, the present Chief of Engineers, Maj. Gen. Julian L. Schley, again officially assured the Congress on March 28, 1938, that: as a general proposition, *there has been no change in the composite judgment of the Army Engineers since the enactment of the Overton Bill on June 15, 1936, as to the necessity for construction of the Eudora and the Morganza Floodways in order to take care of the water that may be expected to pass down the river.* (Gen. Schley, HEARINGS, Senate Commerce Committee, March 28, 1938, p. 27).

And on March 30, 1938, before the House of Representatives, Committee on Flood Control, with all the data before him of the operation of the cut-offs during the 1937 flood (including even the secrets of his subordinate hydraulic experts), the Chief of Engineers again testified: "The records and studies concerning the Mississippi River, already collected and recorded since 1879, constitute the most thorough and voluminous example of river engineering information ever assembled by any nation. \* \* \* There has been *no change* in the idea of the Corps of Engineers that a floodway on the west side of the main channel of the Mississippi River south of the Arkansas River is still neces-

sary in any adequate flood control plan for the alluvial valley of the Mississippi River. We have only the floods of any magnitude which have passed down the river between the levees to judge by; and *that is too little*, because the floods of the Mississippi River vary tremendously. There was never anything like the flood of 1937 in the recorded history of the river itself. So, *until we could have a number of floods of great magnitude to actually test the river it would be impossible to say what its capacity is*. I stand on our recommendation which provides for a diversion in the middle section of the river, and also one in the lower span. *Both are necessary.*" (HEARINGS, House Committee on Flood Control, March 30, 1938, at pp. 3, 17, and 31).

The next day, March 31, 1938, General Harley B. Ferguson, as President of the Mississippi River Commission which is responsible for all authorized flood control works on the Mississippi River, the "father of the cut-offs," testified: "I still make no recommendation for the elimination of either one of the floodways. I concur in the report of the Chief of Engineers submitted after the flood of 1937 (April 6, 1937) recommending the appropriation of an additional \$14,000,000 for the United States to acquire the fee title to lands in the floodways. \* \* \* During the 1937 flood, there was a difference of 7.3 feet in the gage at Arkansas City with substantially the same discharge, one of the gages being taken at the beginning of the flood and the other at the conclusion. The variation in the curve that we call the capacity of the rising river and the capacity of the falling river is enormous—it is startling." (HEARINGS, House Committee on Flood Control, March 31, 1938, at pp. 39, 41 and 45).

*The record in this case is overwhelming to the effect that "cut-offs" (1) increase channel and levee hazards, (2) are purely temporary in their effect, (3) are local in their effect, (4) are ineffective at dangerous flood stages when the water extends from levee top on one side to levee top on the other side of the river, the only time when property owners behind the fuse plug levee need relief, and (5) lead to deterioration below the cut-offs because of the increased velocities through the cut-offs causing bank caving. Also, the single, unique 1937 flood is not a safe test as to the value of cut-offs (R. 276, 280), and the local temporary effects shown in the vicinity of Arkansas City during the 1937 flood will be changed with the completion of the Caulk's Neck cut-off immediately above Arkansas City which was being made during the trial in the District Court (R. 262, 276, 284). (Neptune, R. 272-277; Wonson, R. 279-281; Simons, R. 282-283; Carter, R. 284; Heagler, R. 285-286).*

*"The cut-offs are most effective while the river flows in its natural channel between its natural banks. \* \* \* There is no flood menace behind the fuse plug levee until the water approaches the top of the fuse plug levee. When this stage of the river is reached, the flood plane of the river is from the top of the levees on one side to the top of the levees on the other side, and at this point the cut-offs will be of so little effect as to be of no substantial protection whatever to the respondent's property" (Neptune, R. 275-276).*

*"These cut-offs certainly will not reduce the flood hazard. I am inclined to believe they will tend to increase the flood hazard" (Wonson, R. 280).*

*"The cut-offs neither have had, or will have, any effect on the flood hazards of plaintiff's property. No effects have been indicated that would prevent the overtopping of the fuse plug levee"* (Simons, R. 283).

*"I do not think these cut-offs will be beneficial, or have any appreciable effect on the flood hazard of plaintiff's property in the future. \* \* \* Only with the gage of the Mississippi River levees 60.5 on the fuse plug levee is there danger of the fuse plug levee being overtopped and thus menacing the plaintiff's property. At that stage, I do not think the cut-offs will decrease the flood hazard at all"* (Carter, R. 284).

*"I do not think that these cut-offs in the channel of the Mississippi River have done away with the flood hazards to plaintiff's property created by the placing of plaintiff's property in the Boeuf Floodway by the Flood Control Act of May 15, 1928. The effects of the cut-offs are local and temporary. There has been a serious deterioration in the river below Arkansas City"* (Heagler, R. 285).

*"We have never claimed that they (the cut-offs) would do anything to floods at all"* (Gen. Ferguson, President of the Mississippi River Commission, House HEARINGS, April 1-13, 1935, at p. 681, R. 249).

When confronted with this orthodox engineering testimony, petitioner, in sur-rebuttal, closed its case in a most astounding manner. Its reply to respondent's engineering evidence was the remarkable contention that the preposterous position taken by petitioner's underling engineering witnesses can be explained only by the fact that they are in possession of some sort of mystical secret about flood control and cut-offs which would make their testimony un-



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derstandable, and satisfactory to other engineers, only if those engineers had possession of this esoteric knowledge; but petitioner solemnly assured the Court that it would be impossible for any engineer other than the Government's hydraulic experts who testified at the trial to secure that information. Petitioner's chief engineering expert Mathes, swore: "The principles that have been employed in this work which we have discussed in this case relating to channel stabilization are novel. They are novel to the extent that *no description of them, or of the hydraulic principles which were employed, have ever appeared anywhere in print.* I speak advisedly because I am concerned with making that subject public when the time comes, when I am permitted to do so. Up to the present time *none of the engineer witnesses for the plaintiff who have testified here have been in position to discover, or to find out, either by study or by inquiry, just what are the hydraulic principles employed. It has not been made public.* \* \* \* I am frank to say that *I am not at all in disagreement with the statements which these engineers, and especially those experienced with the cut-off work, have made, because from their point of view and under the conditions which they described, they were probably entirely correct.* Those conditions are not applicable to what we are doing on the Mississippi River today. As I said, *the work is being done in a novel manner; and I do not see how it is possible for any engineers outside of those immediately connected with it to be in a position to judge whether it is being done right or wrong*" (R. 290). This startling testimony is not only astounding and incomprehensible, but strikes one as being more relevant to some voodoo trial in an African jungle rather than competent testimony in the United States of America between a just

sovereign and one of its helpless, wronged citizens. It is also obvious from the recent quotations from Generals Markham and Schley and the Secretary of War that these mystical and undisclosed subtleties are confined solely to the minds of petitioner's hydraulic experts testifying in the District Court, and are wholly beyond the comprehension of the Chiefs of Engineers when explaining engineering necessities to the Congress.

On the contrary, the hydraulic history of cut-offs on the Mississippi River from the earliest times is well known by engineers. From Ellet's Report in 1852 ("Mississippi River Flood Control and Navigation," War Department, May 1, 1932, Vol. III, Plate LXVII), until long after the passage of the Flood Control Act of 1928, cut-offs have been uniformly condemned as *pernicious* and *dangerous*. (See Appendix F of this brief; and Secs. 69, 71, Doc. 90, 70th Congress, 1st Session).

Therefore, the *ONLY* attempted technical defense offered by petitioner, viz., its *theory* that the flood menace to respondent's property has been removed by its mystical cut-offs, has *utterly collapsed*. When considered as a *defense*, petitioner's testimony on this point is manifest rubbish. It starts off from assumptions that are obviously untrue, and therefore, reaches conclusions that are openly at war with both logic and the facts.

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## POINT VIII.

## Depression and Tax Burden

Though not pleaded (R. 18, 77), and though wholly irrelevant to the legal issue of "taking," in futile fishing for some defensive testimony in the District Court, counsel for petitioner sought to prove by innuendo and general misinformation that respondent's loss of market value was due largely to (1) the general economic depression which began in 1930, following the inflation of 1929, and (2) the tax burden upon respondent's land, thus misleading the District Court into its erroneous Findings of Fact Nos. 38 (R. 363) and 42 (R. 364). The *undisputed facts* peculiar to respondent's property, and this case, reveal the absurdity of these theories.

A. *The Depression Bugaboo.* The general depression of 1930-1934 cannot reasonably be used to explain a single dollar of the loss of market value sustained by respondent's property, however much petitioner's counsel may argue to the contrary. It is a matter of general knowledge, of which this Court takes judicial notice, that the economic depression referred to *began in 1930* with a collapse following an unprecedented boom during 1929. The market value of respondent's property was destroyed in the *autumn of 1928*, when it first became generally known that her land had been dedicated by the United States as a floodway. This was in the very midst of the general inflation boom of values enjoyed by the rest of the country. When the depression began *18 months later* respondent's property had no substantial value to be affected. Numerous witnesses testified to this fact, firm and fixed in the record so far as respondent's land is concerned. Her *right* and opportunity to take



advantage of the high prices enjoyed elsewhere in 1929 *was taken* from her by the Flood Control Act of May 15, 1928.

The District Court erred in not correctly finding: "The general economic depression which affected the country at large, beginning with the year 1930, does not account for any of the loss of market value to petitioner's (now respondent) property hereinbefore referred to, because petitioner's property had lost its market value as hereinabove recited many months before the general depression of 1930 began. While general property values elsewhere were at a peak during the boom prices and inflation of 1929, the petitioner's property, and other property *in that vicinity* in the Boeuf Floodway, had lost its market value as hereinabove stated. There was not enough value left to be seriously affected by the later depression. *One cannot kill a dog already dead.* Furthermore, the passing of the general depression and the return to normal values and prices of farming properties generally in protected areas has not, and will not, bring back the market value of the petitioner's property, or other property *in that vicinity* on the floor of the Boeuf Floodway. Therefore, *under the peculiar facts of the case at bar*, the general economic conditions of the country elsewhere have played, and will play, no important part. They offer no explanation whatever of petitioner's special and peculiar loss" (R. 322). *Res ipsa loquitur.*

"The general national economic depression began in 1930. *No part of the loss of plaintiff's (now respondent's) market value can be attributed to that general depression because plaintiff's land had lost its market value prior to that time.* No part of her loss of approximately \$100 an acre can be attributed to that depression. *It had already*



been lost. At the present time, when the depression is passing and the Department of Agriculture reports a return in general agricultural values over the country as a whole to 82% of pre-war level, *no part of the market value has been restored to plaintiff's land in this floodway*" (Hopson, R. 187-188).

"The market value of plaintiff's property was destroyed prior to the general economic depression beginning in 1930" (Baxter, R. 192).

"The general economic depression that began in 1930 did not account for any of the loss of market value of the plaintiff's property. She did not have anything to lose. *She had already lost everything she had. You can't kill a dead dog. The market value of her property had already been ruined.* There is something radically wrong when these fine lands are selling from six bits to a dollar an acre" (Parker, R. 199).

"I do not think the flood of 1927 had any effect on the market value of these lands, cheap cotton, *high taxes, bonded indebtedness*, mortgage indebtedness, *depression* and general trouble has been on the land before and *did not affect it up until the time it was put in the floodway*, so I don't see why they could materially affect the market value then" (Zellner, R. 202).

"*No part of plaintiff's loss of market value can be fairly attributed to the economic depression which began in 1930 because it was generally known that plaintiff's property was in the floodway and it had lost its value before the depression came*" (Neal, R. 203).

③ "General difficult economic conditions to a certain extent adversely affect market value, but the farmer who

carries a reserve does not pay much attention to economic fluctuations in land values because they come back if you are able to hold them. After plaintiff's property had been placed in the floodway in 1928, it had no substantial market value in 1929 when cotton was selling at 18c a pound. I think the value of that land was gone. Nobody could borrow any money on it or get any insurance on it. I couldn't figure why anybody would buy it. *I do not think the economic conditions would have anything to do with property in that floodway. I do not think property in the floodway would be able to participate, or take part in, the general upturn and return to prosperity*" (Mann, R. 206-207).

"I am familiar in a general way with economic conditions, the values of commodities, and such things. *The change of values generally will not change the situation as to the market value of plaintiff's land so long as it remains in the Boeuf Floodway, unless after a long term of years they build reservoirs so that the floodway would never fill up. Maybe within a quarter of a century we might decide it is not going to be the channel of the Mississippi River, which I think it is going to be*" (Matthews, R. 208-209).

"No part of the loss in market value of plaintiff's land, and land in that vicinity, can be attributed to the economic depression which began in 1930, because *their market value had already been destroyed before the depression started*" (Zebold, R. 210).

B. *The Tax Burden Bugbear* was likewise an unsubstantial spectre of the imagination of petitioner's counsel in the District Court. The conclusive refutation of this argument is the undeniable fact that respondent's property

new policy of Federal responsibility for flood control on the lower stem of the Mississippi River (see Point V, B, 2); and that this new policy was expressed by the enactment into law of "one comprehensive project" for the purpose. The Jadwin plan is a unit. When the first spade full of dirt was placed under the Jadwin plan, it began work on the single project which has resulted in the practical destruction of the market value of the respondent's property. See Point II.

But the most inescapable reason for Federal liability on account of respondent's loss, and the conclusive distinction between the present case and the decisions in the *Cubbins*, *Hughes* and *Jackson* cases, is that the Flood Control Act of May 15, 1928, for the first time, by law, took from the respondents their former right of *self-defense*.

After pointing out in a most emphatic way the fact that the damage caused in the *Cubbins* case resulted as a mere incident to the Government's work which was limited to "improving navigation" under the Eads Plan, Chief Justice White reviewed the history of the law of waters from its very inception, and then definitely based the decision on the exception to the general rule of the law of waters to the effect that in times of "accidental and extraordinary floods" every man could protect his own property (as by the building of private levees around his lands) without liability to his neighbors, "BECAUSE all, as the result of the accidental and extraordinary conditions, were entitled to the enjoyment of the common right to construct works for their own protection." "• • • the principles thus stated in no way serve to prevent or to limit the right of proprietors whose lands border on or

are traversed by rivers 'from guarantying themselves against damage by defensive works, constructed either upon the border of the rivers or in the interior of their property,' \* \* \* because each one is entitled to do the same in his own behalf, as the right of preservation and of legitimate defense is reciprocal, since *it is impossible to conceive that the law would impose upon the proprietors bordering upon streams an obligation to suffer their property to be devoured* (by accidental or extraordinary overflows) *without the power on their part to do anything to protect themselves against the disaster.*" 60 L. ed. 1047. So the court thought in 1916.

The court further expressly declared that the Jackson case was decided on the same principle, to-wit: " \* \* \* upon the broad ground that the rights of both owners on each side embraced the authority, without giving rise to legal injury to the other, to protect themselves from the harm to result from the accidental and extraordinary floods occurring in the river, by building levees, if they so desired." 60 L. ed. 1049.

This primeval right of self-defense is definitely and certainly taken from respondent by the enactment into law of the Jadwin plan. The dwellers in the Boeuf Floodway can no longer "protect themselves from the harm to result from the accidental and extraordinary flooding occurring in the river, by building levees, if they so desired."

Since May 15, 1928, the law has been that: "The United States must have control over the Cypress Creek levee and keep it substantially at its present strength and present height" (Doc. 90, sec. 120, R. 124). "To insure that excess water will leave the main river, a fuse plug

section of the levee in the vicinity of Cypress Creek *must* be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade" (Doc. 90, Sec. 118, R. 124). "By far the major portion of the Jadwin plan *depends upon* spillway relief." (Governor Martineau of Arkansas, late United States District Court Judge, House Flood Control Committee Hearings, January 5-17, 1928, Part 4, p. 2500.) See Point IV for complete demonstration and proof.

2. *Constitutional Authority.* Nor can there be any doubt of the full right and authority of the Congress to have taken this action. In *Scranton v. Wheeler*, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126, at p. 136, the court declares: "The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. . . . So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable waters against the will of Congress, and *Congress may summarily remove such obstructions at its pleasure.*" 45 L. ed. 136. See Epilogue, this brief.

In *Gilman v. Philadelphia*, 3 Wall. 713, 724, 18 L. ed. 96; 99, the court said: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and *to the extent necessary*, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and



subject to all the requisite legislation by Congress." \* \* \*  
 "It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided." 45 L. ed. 136.

In *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668, 670, the court holds: "Where Congress has taken exclusive charge and control of a harbor improvement, that action is conclusive of any right to the contrary asserted under State authority." The court says: "It is to be observed, as preliminary to an examination of the Acts of the General Government in the special matter before us, that the whole system of river and lake and harbor improvements, whether on the seacoast or on the lakes or the great navigable rivers of the interior, has for years been mainly under the control of that Government, and that, whenever it has taken charge of the matter, its right to an exclusive control has not been denied." 24 L. ed. 668.

In *United States v. Chandler-Dunbar W. P. Co.*, 229 U. S. 53, 33 S. Ct. 667, 57 L. ed. 1063, the court emphasized: "It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

The Chief of Engineers of the United States declares: "The Mississippi River is the world's greatest river, combines size with usefulness, and is one of the grandest and most valuable assets of the United States" (Doc. 90, sec. 43, Tr. 121). See Epilogue, this brief.

Before closing the discussion of *Cubbins v. Mississippi River Commission*, *supra*, we note that the court specifically rejects the suggestion of General Jadwin, and of coun-

No. 92 by the Acts involved and judicial notice, Doc. 90, sec. 121, R. 124;

No. 94 by Seybold R. 258, Mathes R. 247;

No. 95 by maps, R. 391, Mathes R. 246;

No. 96 by the Acts involved;

No. 100 by Stipulation, R. 291-298, 151, Sponenbarger R. 179-181, R. 80-81.

When these *uncontroverted* and *incontestable* Findings are considered in connection with those Facts established by the unquestionable Public Documents referred to in subdivision 1 of this Point petitioner cannot escape the just, judicial logic which requires judgment for respondent as prayed (R. 16, 334, 350).

3. Each of the other Findings of Fact requested by respondent not covered by subheadings 1 and 2 of this Point, are thoroughly covered and established by the other Points of this brief.

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## POINT X.

*Decisions, relied on petitioner, distinguished.*

The petitioner relies upon such decisions as *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041; *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363; *Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374; *Sanguinetti v. United States*, 264 U. S. 146, 44 S. Ct. 264, 68 L. ed. 608; *Horstmann Co. v. United States*, 257 U. S. 138, 42 S. Ct. 58, 66 L. ed. 171; *Bedford v. United States*, 192 U. S. 217, 24 S. Ct. 238, 48 L. ed. 414; and *Gibson v. United States*, 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996; *Willink v. United States*, 240 U. S. 572, 36 S. Ct. 422, 60 L. ed. 808.

The Circuit Court of Appeals readily distinguished these and similar decisions from the authorities upon which respondent is relying in this brief. The principles therein announced have absolutely no application to the facts in the case at bar. None of these decisions, nor any other decision which petitioner can cite with effect, are based upon the Flood Control Act of May 15, 1928, but were all prior to that revolutionary enactment by the Congress of a new statutory rule of law.

In *Horstmann Co. v. United States*; *supra*, the court points out that the damages therein involved "could not have been foreseen or foretold." The court says: "• • • it would border on the extreme to say that the Government intended a taking by that which no human knowledge could even predict. Any other conclusion would deter from useful enterprises on account of a dread of incurring unforeseen and immeasurable liability." "The court found that

there is obscurity in the movement of percolating waters, and that there was *no evidence* to remove it in the present case, and necessarily there could not have been foresight of their destination, nor *purpose to appropriate* the properties." 66 L. ed. 175.

On the contrary, in the case at bar we have shown that the Jadwin Plan very *definitely* and *certainly foresees* and *foretells* exactly what is to happen to respondent's property in Boeuf Floodway, and the Congress, with constitutional *foresight*, expressed its deliberate "*purpose to appropriate the properties.*"

In *Sanguinetti v. United States*, 264 U. S. 146, 44 S. Ct. 264, 68 L. ed 608, on which petitioner seems to place special emphasis, the decision is wholly inappropos because there the court merely announced the well understood legal principle that: "There is no remedy against the United States for *tort* in casting water on private property." No tort is involved in the case now before this court. Also the court again emphasized the determinative importance of the *intention* of the Government, saying: "It was not shown, either directly or inferentially, that the Government or any of its officers, in the preparation of the plans or in the construction of the canal, had any *intention* to thereby flood any of the land here involved, or had any reason to *expect* that such result would follow: \* \* \* It was not shown that the overflow was the *direct or necessary result* of the structure; nor that it was within the *contemplation of*, or reasonably to be *anticipated* by, the Government. If the case were one against a private individual, his liability, if any, would be in *tort*. There is no remedy in such case against the United States." 68 L. ed. 610.

This language cannot possibly be truthfully applied to the facts alleged in the case at bar. In fact, it is the very converse of the instant case and therefore proves our point.

In *Jacobs v. United States*, (5th Circuit) 45 F. (2d) 34, the court discussed and distinguished in detail the *Sanguinetti* case by pointing out that: (1) When the Sanguinetti work was constructed, the flooding of the land sued for was *not contemplated or reasonably to be anticipated*; (2) That prior to the construction of the canal by the Government, the land had been subject to the *same* periodic overflow, and if the amount was increased, the extent of the increase was *purely conjectural*; (3) That it was *not shown* that the overflow was *a direct or necessary result of the structure*; (4) That the facts were such as to preclude the *implication by the government to pay*, because there was no contemplation of the damage, nor could it be anticipated; (5) That the overflow of claimant's lands was not shown to be a direct or necessary result of the canal built; and (6) There was *no authorization for the purchase of an easement*.

Wherein, then can petitioner find any consolation by citing the Sanguinetti case in the present proceedings?

1. Re: *Self-Defense*. The *Cubbins*, *Jackson*, and *Hughes* cases readily distinguish themselves. They were all decided many years *before the Government assumed responsibility for flood control*—the *Cubbins* case, the last having been decided June 5, 1916, more than twenty-three (23) years ago. (241 U. S. 351, 36 S. Ct. 671; 60 L. ed. 1041.) The fact was stressed in the congressional debates that the Flood Control Act of May 15, 1928, destroyed the force of such precedents as the *Cubbins*, *Hughes* and *Jackson* cases by deliberately adopting for the first time the



against petitioner and *require* judgment on this appeal for respondent. All else can go *only* to the *amount* of the judgment.

2. Respondent's requested Findings of Fact established by *undisputed* and *indisputable evidence*, are as follows:

No. 1 by Sponenbarger R. 179-180;

No. 2 by the pleading itself, R. 4-16;

No. 22 by Neptune R. 158, Wonson R. 167, Simons R. 175, Mathes R. 238, 244;

No. 23 by Seybold R. 258;

No. 24 by R. 138-139, Neptune R. 162, Wonson R. 170, Simons R. 178;

No. 30 by Oliver R. 253, Wonson R. 168-169, Mathes R. 246, Neptune R. 157, 158, 164, Seybold R. 258, and *passim*;

No. 32 by R. 142-144, 147, 148, 395, Neptune R. 157, Wonson R. 167, 171, Simons R. 175-178, Mathes R. 248-250, and *passim*;

No. 33 by Neptune R. 161, 278, Wonson R. 170, Simons R. 174, Hopson R. 184;

No. 34 by Oliver R. 251, Neptune R. 157, 165, Wonson R. 172, Simons R. 177;

No. 35 by Oliver R. 251-253, Neptune R. 158, 159, 164, Wonson R. 168;

No. 36 by Markham R. 144, Neptune R. 160, Wonson R. 281, Doc. No. 90, secs. 97, 118, 120, 121, R. 123, 124;

No. 38 by Neptune R. 161, 163, Wonson R. 170, 171, Simons R. 174;

No. 45 by Sponenbarger R. 179;

No. 46 by R. 179, 181, 185, 397 and maps;

No. 47 by maps and R. 395, Neptune R. 159, 160, 163, Wonson R. 168, Simons R. 176;

No. 48 by Point III;

No. 49 by Doc. 90, sec. 56, R. 121-122, Wonson R. 169, Neptune R. 161, 163;

No. 50 by Simons R. 177;

No. 51 by R. 397, Neptune R. 160, 161, Simons R. 177;

No. 53 by Doc. 90, sec. 80, R. 122, Doc. 798, p. 25, R. 138, Simons R. 177;

No. 54 by R. 397, Sponenbarger R. 179, 181, Hopson R. 185, 187, Baxter R. 194, Parker R. 197, Zellner R. 202, and *passim*;

No. 55 by Hopson R. 184, 185;

No. 56 by Sponenbarger R. 182, Hopson R. 185, Clayton R. 201, Zellner R. 202, Neal R. 203;

No. 57 by R. 399;

No. 58 by Sponenbarger R. 180, Hopson R. 185, Baxter R. 192, Thompson R. 195, Parker R. 197, Clayton R. 201, Zellner R. 202, Neal R. 203, Courtney R. 204, Mann R. 206, Prewitt R. 207, Matthews R. 208, Zebold R. 210;

No. 59 by Sponenbarger R. 182, Hopson R. 188, 189, Baxter R. 193, Parker R. 197, and *passim*;

No. 61 by Sponenbarger R. 181, Baxter R. 194;

No. 69, by Sponenbarger R. 181;

No. 72 by R. 137, 142, 180;

No. 76 by Doc. 90, sec. 96, R. 122, Doc. 798, p. 2, R. 137, Doc. 798, p. 47, R. 139, Markham R. 150, Neptune R. 166, Wonson R. 172, Mathes R. 243, Clemens R. 259;

No. 83 by Mathes R. 251, Clemens R. 262, Markham R. 140, 141, 143, 145, 146, 249, 250;

No. 84 by Mathes R. 246, 249, 250, Seybold R. 258, Clemens R. 262;

No. 87, by Neptune R. 166, Wonson R. 282, Simons R. 178, Carter R. 284;

*in the floodway, so I don't see why they could materially affect the market value then"* (Zellner, R. 202).

*"The low price of cotton, overlapping of taxes and heavy tax burdens, and general difficult economic conditions to a certain extent adversely affect market value, but the farmer who carries a reserve does not pay much attention to economic fluctuations in land values because they come back if you are able to hold them. \* \* \* Farmers are the most optimistic people on earth. They think that next year is going to put them on their feet. People with money do not let these economic fluctuations bother them, because it has been my observations that if anybody can hold lands such as these, they always come back whether it is worth \$10 an acre or \$100 an acre \* \* \*"* (Mann, R. 207).

*"No part of plaintiff's loss in market value can be attributed to the tax burden because plaintiff's land was wholly in production and she was paying her taxes and was not disturbed by \$1 an acre tax"* (Zebold, R. 210).

The increases of improvement district taxes and assessments and bonded indebtedness on lands in this vicinity were between 1918 and 1925 (petitioner's expert Bayley, R. 231), long before respondent purchased her land in 1927, all of which was in actual cultivation and production (Sponenbarger, R. 179).

As Point VII disposes of petitioner's expert engineering testimony, so does this Point VIII dispose of its expert lay testimony. On the entire record, without substantial contradiction, respondent was entitled to judgment in the District Court for the entire amount sued for (R. 16, R. 334, par. 101; R. 350, par. 61).

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## POINT IX.

**FINDINGS OF FACT, requested by respondent, justified.**

The purpose of this Point is to stress the legal fact that *each* Finding of Fact requested by respondent (R. 298-334) is justified by the evidence, and supported by the record, by either (1) official Public Documents, in evidence by stipulation (R. 298 and 156), or by (2) *Undisputed* Testimony, or by (3) overwhelming and indubitable *Evidence*. This is demonstrated by a careful checking of each numbered request against the transcript Record reference immediately following, as will now be listed.

1. Respondent's requested Findings of Fact *conclusively established by public documents* are as follows: No. 3 by R. 118, and see Point II; No. 4 by Congressional Records cited in this brief, and Neptune, R. 157; No. 5 by Doc. 90, sec. 3, R. 119; No. 6 by R. 122-123; No. 7 by R. 144; No. 8 by R. 120; No. 9 by R. 143-144; No. 10 by R. 123; No. 11 by R. 124; No. 12 by R. 124; No. 13 by R. 124; No. 14 by R. 124; No. 15 by Doc. 90, sec. 134, p. 31; No. 16 by R. 126; No. 17 by R. 127; No. 18 by R. 128; No. 19 by R. 128; No. 20 by R. 127-129; No. 21 by R. 129-130; No. 24 by Doc. 90, sec. 118, R. 124, and Doc. 798, R. 138, 139; No. 26 by R. 138, also Wonson, R. 169; No. 27 by R. 139; No. 28 by R. 146, and R. 250; No. 29 by R. 140-141; No. 31 by Title 33 U. S. C. A. secs. 641, 647, 648, 701, 702, R. 132; No. 43 by Congressional Records herein cited; No. 78 by Doc. 90, secs. 69, 70 and 71, R. 248, and see Point VII; and No. 92 by Doc. 90, secs. 8 and 23, R. 120, and sec. 121, R. 124. These are more easily checked in the study of Point I.

The foregoing Findings of Fact, of which the Court must take judicial notice (see Point I), establish *liability*

actually had a market value of \$100 per acre at the time she bought it in 1927 *notwithstanding all tax and assessment burdens to which it had been subjected*. Improved agricultural lands in the vicinity of respondent's property were then readily selling at from \$100 to \$150 per acre subject to the identical tax burdens and bonded indebtednesses which remained on the lands after their values were destroyed following the Flood Control Act of May 15, 1928. Lands *not in a floodway* that produce a bale of cotton per acre easily bear the tax and assessment burden to which respondent's property is subjected. *There has been no change in that tax and assessment burden since respondent bought her property*. Market values changed violently and suddenly upon the creation of the floodway, with no change in tax burdens. The District Court erred in not finding as requested: "Much testimony was offered relative to the *tax burden and bonded indebtedness* of much of the area affected by the Boeuf Floodway. This evidence is immaterial as to the petitioner's (now respondent) property, and merely tends to confuse the issue. *No tax burden has increased since the petitioner bought her property January 20, 1927. No bonded indebtedness affecting this property has been increased since petitioner bought her property*. Petitioner's property had a fair market value of \$125 per acre *notwithstanding its tax burden and the bonded indebtedness affecting it*. Had the tax burden been substantially lower the market value would probably have been higher, but no part of the loss of market value hereinabove referred to can be justly attributed to the tax burden or bonded indebtedness affecting the property. *The values mentioned actually existed in spite of those burdens, and the market*



value of petitioner's property was lost *regardless of those burdens*" (R. 322-323). *Res ipsa loquitur*.

*"No part of the plaintiff's loss of market value can be attributed to the bonded indebtedness or taxes and assessments against her land. There has been no change in the tax burden since the plaintiff bought her land in 1927. The market value of plaintiff's land in 1927 existed notwithstanding the tax burden in which there has been no change except to lower assessments"* (Hopson R. 188).

*"The tax burden on plaintiff's 40 acres of land is not more than \$40 a year. A dollar an acre on this land would not affect its value at all because that is low taxation. Lands in production can carry the burden easily. The market value of plaintiff's property to which I have testified existed in spite of its tax burden. No indebtedness whatsoever has been added to it since it was put in the floodway. The annual tax burden has recently been lessened in Cypress Creek Drainage District by a refunding program. The loss in market value of plaintiff's property occurred on account of the passage of the Flood Control Act of May 15, 1928, adopting what we call the Jadwin Plan (Baxter, R. 192).*

*"We have had the same tax burden on these lands for years while the market values have been increasing. No bonds have been issued in the territory since 1927. The plaintiff has paid her taxes all along up to date. Notwithstanding the tax burden, the cleared land in this area had an actual market value of from \$100 to \$125 per acre just before it was put in the floodway"* (Parker, R. 199).

*"High taxes and bonded indebtedness has been on the land before and did not affect it up until the time it was put*

Therefore there can be no fair comparison between the decision in the *Matthews* case and in the case at bar. They are *not* in conflict, direct or otherwise.

The words of Judge Hamilton in his dissenting opinion in *Franklin v. United States*, 101 F. (2d) 459 at pp. 465-466, are peculiarly applicable to the facts in the case at bar, viz:

"All general statements in opinions of courts that acts done in the proper exercise of governmental powers and *not directly encroaching upon private property*, though their consequences may impair its use, are not a taking within the meaning of the constitutional provision and do not entitle the owner to compensation, must be read in the light of *the facts peculiar to each case*, and when this is done, *there are no conflicts in judicial pronouncements.*"

"According to the allegations of appellants' (in this case respondent's) pleadings, their lands did not lie within the dangerous flood area of the Mississippi River and its taking was not a contribution to public use *which brought to them an equal benefit* but they were required to contribute more than their share for the public good. *This is inequality, the antithesis of justice.*"

7. *Franklin v. United States*, (No. 845 this Court) 101 F. (2d) 459. This *Franklin* case is in no sense equi-parant with the case at bar. It does not involve the *flood control responsibility* for the first time deliberately and purposely assumed by the United States by the passage of the Flood Control Act of May 15, 1928 (See Points IV and V, B of this Brief).

The opinion merely reiterates the well established rule that:

"The construction by the United States of dikes on the bank and in the bed of the Mississippi River for the purpose of changing current to improve navigation, which resulted after a year in washing away of plaintiff's land on the opposite side of the river, was not a compensable 'appropriation' of plaintiff's property within purview of the Fifth Amendment."

The Court cites the well known line of decisions which have always held: "*Riparian* ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard," \* \* \* "for the owner's title was in its very nature *subject to that use* in the interest of public navigation." 101 F. (2d) 459 at p. 461.

No such point is involved in the instant case.

The opinion of the Circuit Court of Appeals shows thorough familiarity with the decisions upon which petitioner relies, and, we submit, is convincing in its conclusion that none of those decisions are applicable to the peculiar facts of the instant case. 101 F. (2d) 506.

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headwater from the tributary St. John's Bayou every time either of those streams reached flood stage of sufficient elevation to inundate this low lying adjacent land. This area is distinguished on the Army Engineer Map by *dark green*—the same color which is used on the area lying along the river channel *between* the levees. The Flood Control Act of May 15, 1928, could not, and *did not*, undertake to protect these *dark green* areas on the map which lie between the levee lines and in these *back-water areas* where natural streams empty into the Mississippi River, the mouths of which could not be closed (R. 260). These back-water areas which the Act did not propose to materially affect one way or the other are found on the map (1) at the mouth of Red River in Louisiana, (2) at the mouth of Yazoo River in Mississippi, (3) at the mouths of Arkansas and White Rivers in Arkansas, (4) at the mouth of the St. Francis River in Arkansas, and (5) at the mouth of St. John's Bayou in Missouri in which the Matthews lands were located (R. 260).

Therefore, in the *Matthews* case the Court of Claims found as an ultimate fact:

*"Plaintiff's land has been subject to complete inundation by backwater and headwaters without any cutting down or reduction by the United States in the height of the river-side levee. As shown in the findings, all of plaintiff's land lies within the backwater area of the Birds Point-New Madrid Floodway." \* \* \**

"The record justifies the conclusion that if the river-side levee was high enough and strong enough to afford complete protection against overtopping and crevassing at 58 feet on the Cairo gauge 100 per cent of plaintiff's land would be overflowed by backwater at a stage of 58 feet.

"The evidence of record does not establish that any additional headwater flowing over plaintiff's land by reason of the cutting down or reduction by the defendant of a section of the riverside levee near Birds Point to a grade equivalent to 55 feet on the Cairo gauge will injure, damage or place upon plaintiff's timber, or land a substantial burden or servitude *to any greater extent than the timber and land have heretofore suffered*, or that the creation of such spillway, through the reduction in height of a portion of the riverside levee, will actually deprive plaintiff of any valuable property rights which he heretofore enjoyed and possessed in the land and timber." 87 C. Cls. 662.

This ultimate fact as declared in the opinion is supported by the special findings of the Court to the effect that under the provisions of the 1928 Act the Matthews lands would be submerged by *natural back-water* from the Mississippi River through St. John's Bayou *before* the Birds Point spillway would begin to function. Hence, any headwater which came to the Matthews land from the upper end of the Birds Point Floodway would find those lands *already under water*, and could inflict no additional damage.

*No such comparable condition exists in the case at bar.* As is shown by the Army Engineer Map, the respondent's land lies in *no back-water area*. On the contrary it lies side by side with the county seat itself in an area of fast, sound land which had long since been reclaimed from the primeval bed of the Mississippi River (if in fact it was ever in it), and which at the time of the passage of the Flood Control Act of May 15, 1928, was *completely protected* from flood waters from the Mississippi River.



## POINT XI.

**COMPENSATION. The Law. The Facts.**

*Justice delayed is justice denied.* The record in this case is complete. The case is fully developed. *All* the evidence is before this Court. Respondent has already been unfairly impoverished by this tremendously expensive litigation. An humble citizen seeking the enforcement of a simple constitutional right is crushed by the costs, delays and the unlimited resources of a powerful Government. Remanding for further trial may well complete her utter economic annihilation. Any reasonable view of *all* the evidence requires final judgment for respondent, without further futile cost or delay. She has been already entitled to this relief *for more than 5 years*. Therefore respondent pitiously prays, and earnestly urges, either that final judgment be entered for her in this Court on the entire record, or that the case be remanded with specific direction to render judgment for respondent as prayed (R. 16). To support which, respondent respectfully submits the remainder of this brief, as follows:

1. Every pertinent phase of the **LAW** supporting every requested Conclusion of Law on the subject of Compensation is hereinafter presented in orderly arrangement. See Subject Index to this point.

Here suffice it to summarize that the just compensation to which respondent is constitutionally entitled is the market value of her property "*at the time of the taking contemporaneously paid in money.*" It does *not* include any element either augmenting or reducing the compensation *resulting subsequently to the taking.* The highest and

most profitable use for which the property is adaptable and needed, or likely to be needed, in the reasonably near future, is to be considered to the extent that the prospects of demand for such use affects the market value when the property is privately held. This measure of compensation for flowage easement is definitely and particularly settled by this Court in the case of *Olson v. United States* (*Brewster v. United States*), 292-U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236 (affirming—C.C.A. 8th,—67 F. (2d) 24; 106 A. L. R. 961).

The compensation, or measure of damage, is the difference between the fair, reasonable market value of the whole farm as it stood on the date of the appropriation and the fair, reasonable market value after the appropriation, in its then condition. The only safe rule is to inquire what the property unaffected by the floodway easement would have sold for immediately prior to its dedication as a floodway, and what it would sell for as affected by the floodway. The "just compensation" is the decrease in the market value of respondent's land, considered as a whole, by reason of the detriment to it as a whole consequent upon the servitude impressed, and resulting from the construction work done under the authority of the Flood Control Act of May 15, 1928. *Olson v. United States*, *supra*; *United States v. Chicago, Burlington & Quincy Railroad Company*, (C.C.A. 8th) 82 F. (2d) 131, 106 A. L. R. 942, certiorari denied 298 U. S. 689, 56 S. Ct. 957, 80 L. ed. 1408; Annotation 106 A. L. R. 935, and at p. 959. The testimony is without substantial contradiction on this point.

amount of damages or determine the amount of the "compensation" required by the Fifth Amendment.

The applicable rules of practice on this point on the record in the instant case are probably the following:

The appellate court will review the findings of the lower court as to the particular facts:

(1). "Where *conclusions of law* and *findings of fact* are so *intermingled* as to make it necessary to analyze the facts in order to pass upon the question."

*Truax v. Corrigan*, 257 U. S. 312, 325, 42 S. Ct. 124, 27 A. L. R. 375, 66 L. ed. 254, at p. 260.

*Fiske v. Kansas*, 274 U. S. 380, 385, 47 S. Ct. 655, 71 L. ed. 1108, at p. 1111.

(2). "Where it is insisted that a Federal right has been denied as the result of a finding of fact which is without support in the evidence, and the evidence is before the Court in the record by which the insistence may be tested, and it appears that there is a mixed question of law and fact, it is incumbent upon the court to analyze the evidence to the extent necessary to give the plaintiff in error the benefit of the asserted Federal right."

*Sputhern Pacific Co. v. Schuyler*, 227 U. S. 601, 611, 33 S. Ct. 277, 57 L. ed. 662, at p. 669.

*Fiske v. Kansas*, 274 U. S. 380, 385, 47 S. Ct. 655, 71 L. ed. 1108, 1111.

(3). "Where the record contains all the testimony upon which the Judges' findings of fact are based, the appellate court may determine whether such findings are supported by competent evidence, and, if they are not, reverse the judgment. *Collier v. United States*, 173 U. S. 79, 19 S. Ct. 330, 43 L. ed. 621, at p. 622; *United States v. Clark*, 96 U. S. 40, 6 Otto 37, 24 L. ed. 696, at p. 698.

(4). "In all Acts of Congress regulating judicial proceedings, the word '*appeal*,' unless restricted by the context, indicates that the *facts*, as well as the *law*, involved in the judgment below, may be reviewed in the Appellate Court."

*Capitol Traction Company v. Hoff*, 174 U. S. 1, 37, 19 S. Ct. 580, 43 L. ed. 873, at p. 886.

The Circuit Court of Appeals was infallibly right in its self-evident findings and conclusions on the record before it.

6. *Matthews v. United States*, 87 C.° Cls. 662. The facts in this *Matthews* case are not at all analogous to those in the case at bar. Counsel are in error in suggesting "There is no distinction in principle between the two cases" (Petition for Certiorari, p. 21). The principles upon which respondent herein relies were not applicable to the ultimate facts found by the Court of Claims to exist in the *Matthews* case.

By referring to the official Map of the "Plan of the Army Engineers for Flood Control, adopted by the Act of May 15, 1928," it will be seen that the *wild, timber* lands involved in the *Matthews* case lie, and have always been, in the "*back-water*" area of the Mississippi River in the basin of St. John's Bayou. This means that *before the Government did anything* every time the Mississippi River overflowed its natural banks in that latitude the water escaped from the Mississippi River through the *natural outlet* of the mouth of St. John's Bayou, and backed up this bayou so as to overflow the claimant's lands. When the Flood Control Act of 1928 was passed, as well as before and since alike, this area was *naturally* subject to floods from the *back-water* of the Mississippi River and

ed. 621; *United States v. Buffalo Pitts Company*, 234 U. S. 228, 34 S. Ct. 840, 58 L. ed. 1290, 1292."

<sup>A</sup> *Wessel v. United States*, 49 F. (2d) 137 at p. 139.

Moreover, in this case petitioner's proposition is entirely academic and moot, and all similar authorities are entirely beside the point. Here there is no conflict in the evidence as to *a single material physical fact*. Every essential, underlying fact necessary to establish liability as alleged in respondent's Petition is undisputed. These material physical facts are immutably fixed by the official PUBLIC DOCUMENTS referred to in respondent's brief. See Point I.

Petitioner requests that this Court shut its eyes "to the plainest facts of our national life and to deal with the question in an intellectual vacuum." This the Supreme Court declines to do. *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U. S. 1, 81 L. ed. 893, at p. 914.

The only conflicts and confusion in the instant case lie in:

(1) *Conclusions of Law*, upon which this Court will reach its own independent judgment; and

(2) Inconclusive *opinions* of so-called expert engineers, based on undisputed physical facts, and prognostic conclusions—fantastic prophecies of the future.

"Expert opinions are controlling only in so far as they are found to be reasonable. . . . No rule of law compels (a court) to give a controlling influence to opinions of experts, or to surrender his own judgment."

*The Conqueror*, 166 U. S. 110, 131, 133; 41 L. ed. 937, 947.



*Aetna Life Insurance Company v. Ward*, 140 U. S. 76, 88; 35 L. ed. 371.

*Head v. Hargrave*, 105 U. S. 45, 49; 26 L. ed. 1028.

*Dayton Power & Light Company v. Public Utilities Commission*, 292 U. S. 290, 299; 78 L. ed. 1267, at p. 1275.

Incredible testimony, though uncontradicted, is not accepted by a Court. *Reis v. Reardon*, (8 C.C.A.), 18 Fed. (2d) 200, at p. 202.

Petitioner's authorities on this point are not apt.

This is not a law case where a jury was waived. No jury is possible under the Tucker Act (Title 28, U.S.C.A., Sec. 41 (20)). The Findings in this case are more nearly like the Findings in a suit in equity which "may be revised by the appellate court if they are against the weight of the evidence." *Morley Construction Company v. Maryland Casualty Company*, 300 U. S. 185, 57 S. Ct. 325, 81 L. ed. 593; *Dodge v. Knowles*, 114 U. S. 430, 5 S. Ct. 1108, 29 L. ed. 144, 146; *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271.

But even in law cases, and with jury trials, "*A finding in the nature of a legal conclusion is reviewable.*"

*Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 80, 20 S. Ct. 545, 44 L. ed. 673, 681.

*The Britannia v. Cleugh*, 153 U. S. 130, 141, 14 S. Ct. 795, 38 L. ed. 660, 664.

In this case, the issue of *liability* was purely one of *law*. On the record made, it would have been the duty of the trial Court to have instructed the jury that under the undisputed physical facts and laws involved the respondent's "property" (*not land*) was "taken," and the only possible duty of a jury could have been to assess the

sel for petitioner in the case at bar, that the United States is not responsible for returning the water of the river "to its ancient bed." After refuting that erroneous statement in detail, Chief Justice White closes the opinion of the court by stating: " \* \* \* when the principle laid down in the *Jackson* case is illustrated by the ruling which was made in the *Hughes* case, it becomes apparent that the contention here urged as to the identity between the great valley and the flood bed of the river was adversely disposed of, since under no view could the ruling in the *Hughes* case have been made except upon the theory that the bank of the river was where it was found, and did not extend over a vast and imaginary area." 60 L. ed. 1049.

At least one other former, judicial principle announced in *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363, is expressly repealed and reversed by the proviso of section 3 of the Flood Control Act of May 15, 1928, which reads: "*Provided, however, that if in carrying out the purposes of sections 702a to 702m of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.*" Title 33, U.S.C.A., sec. 702c.

*Hughes v. United States, supra*, also decided twenty-six (26) years ago, expressly distinguishes itself from the case at bar by stating: (1) "The acts of Congress but authorized an improvement of *navigation*, and empowered expenditures for that purpose," there being no thought on the part of the Government at that time of assuming a responsibility for flood control; and (2) "There is no pretense of any *intention* to injure the claimant by the building of the new levee"; and (3) The destroying of claimant's levee (protection) by the United States engineers was a *tort*, not being authorized; and (4) The claimant's *right to self-defense had not been taken*. The court explained that under the law then existing: "The facts just stated serve to demonstrate the error which was committed in deciding that the exertion of national power to build levees for improving *navigation* had effaced the exercise of State power to construct levees for protection from overflow, \* \* \*." 57 L. ed. 1378.

3. *Harbor line cases*. In *Willink v. United States*, 240 U. S. 572, 36 S. Ct. 422, 60 L. ed. 808, the property involved was below the mean high-water line and was within the harbor area over which the United States had complete constitutional control for the purpose of navigation. Therefore, under the facts in that case, the court was clearly right in holding that "no right of his (the claimant) was infringed. The river being navigable and tidal, whatever rights he possessed in the land below the mean high-water line were subordinate to the public right of navigation and to the power of Congress to employ all appropriate means to keep the river open and its navigation unobstructed. \* \* \* Such inconvenience and damage as he (claimant) sustained resulted *not* from a taking of his

property, but from the lawful exercise of a power to which it had always been subject." 60 L. ed. at pp. 810-811. This state of facts bears not the slightest analogy to the situation of the respondent, and her land, in the case at bar. "It has also been recognized that a different question arises when active measures are taken against an individual proprietor to maintain a location of limits in alleged violation of his *private rights*, and thus to prevent him from enjoying what is asserted to be the lawful use of his *property*." *Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. ed. 570, at p. 578. So with all the harbor line cases.

Similarly every other case which petitioner may cite will, on careful study and analysis, be readily distinguished by the court from the peculiar facts and the statutory edict involved in the case at bar, as was done by the Circuit Court of Appeals.

"*The constitutionality of the Flood Control Act of May 15, 1928, is hereby expressly admitted.*" See *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449; *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

4. Re: CONSEQUENTIAL DAMAGES. *Bedford v. United States*, 192 U. S. 217, 24 S. Ct. 238, 48 L. ed. 414; *Gibson v. United States*, 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996, and numerous similar cases which petitioner cites, are all cases of *incidental, unanticipated, unintentional, un- contemplated, or consequential damages* only, as distinguished from "*a taking*" of property as illustrated by the authorities on which appellant relies. See Point V, B. and D.

In the *Bedford* case decided 35 years ago, as a fair sample of petitioner's authorities, it was shown: (1) The work done by the Government "did not change the course of the river as it then existed, but operated to prevent further changes"; and (2) "To what extent the injury would have been decreased is conjectural"; and (3) "The injury done to the claimants' land was the effect of *natural* causes"; and (4). The work involved was strictly in aid of *navigation*, there having been at that time no thought of Government responsibility for flood control.

So also will a study of any case cited by petitioner in support of its argument that only consequential damages are involved in the case at bar readily distinguish itself from the facts of the instant case.

5. *Weight of the Findings of the District Court.* Petitioner cites *Wessel v. United States*, 49 F. (2d) 137, 139 (C.C.A. 8th), and *United States v. Gamble-Skogmo*, 91 F. (2d) 372, 374 (C.C.A. 8th) in support of its proposition that the findings of the trial court as to the facts are controlling when reasonably supported by substantial evidence (Petition for Certiorari, p. 16).

We first notice that these decisions are by the same Circuit Court of Appeals from which the instant appeal is taken. That court is doubtless thoroughly familiar with the full extent of its own rules of practice and decisions.

"If the question of whether or not there is any substantial evidence to support the findings of fact was properly raised at the trial and preserved for review by this court, we are satisfied that *it is our duty to pass on that question as one of law*; all the evidence being before us. *Collier v. United States*, 173 U. S. 79, 19 S. Ct. 330, 43 L.



Mississippi River on a piece of land you are going to damage that land. We all know that. *I do not think the Jadwin Plan will be used.* I don't think you can make people believe that there is a threat to turn the river on our land" (Cain, R. 213-214).

We wonder who so instructed this witness?

(3) "I live in Chicot County. We have never handled any lands in Desha County. I would absolutely oppose any floodway that would endanger our property. *The Jadwin Plan has been abandoned.* I base my testimony and conclusions on this premise that the Jadwin Plan has been abandoned and *I know we are not in the floodway.*

• • • This threat of being flooded scares people to death. It had not a particle of effect on the market value of the lands. If the Arkansas and White Rivers had been in flood stage in 1927, when the crest of the Ohio River flood came down I still think *we would have been protected* in our community because the Government can come in there and help the 800 or 900 men and *build up the fuse plug levee 3 or 4 feet higher, and take the water down the river past Chicot County. I believe the Government Engineers would build up this levee with bags of dirt to hold the water 4 or 5 feet above the levee if necessary.* • • • *We have never yet actually been in a floodway as a result of the construction work done by the Government.* • • • *We would never have a spillway.* I don't think the spillway has ever been in operative condition" (Davis, R. 214-216).

(4) "I live in Chicot County. *I am not familiar with Desha County nor the flowage rights there as covered by the Jadwin Plan.* • • • My testimony is based on my un-

derstanding that the country to which I refer has never actually been in any floodway yet" (Moore, R. 220-221).

(5) "I live in Chicot County. *The market value of my land* took a drop about 1921 because of high taxes for drainage and levee purposes. I recall the floods of 1912, 1913, 1916 and 1927. The 1927 flood was the biggest flood we ever had. It was not destructive or damaging to any great extent. \* \* \* *I had rather have land inside the floodway than outside* because overflows deposit soil and makes the land better" (McGehee, R. 221).

Witness' land in Chicot County may have dropped in value in 1921, but respondent's land in Desha County was selling for \$125 an acre in 1927. Nor would respondent, or the average buyer of a farm, prefer to have his farm between the levees of the Mississippi River, or inside the floodway of the Mississippi River, because that mighty stream deposits soil, silt, sand bars, debris and what you will when its wild rampage is over.

(6) "I live in Chicot County. I am *not familiar* with any particular farm land or place in Desha County, nor with the plaintiff's land involved in this lawsuit. In my opinion all of the lands in the alluvial valley of the Mississippi River in Southeast Arkansas and the State of Mississippi and in Louisiana *are equally subject to flood*. I do not understand that the property has ever actually been in any existing potential floodway as designated by the Flood Control Act of May 15, 1928. Seventy-five per cent of the people in Chicot County do not believe the Jadwin Plan would ever be perfected. In my opinion it never has been and never will be. *My testimony relative to how values have been affected by the floodway are based*

*on the assumption that the floodway has never actually been put into operative condition. If this levee of the 1928 Act had been made, and it looked like a sure fact that this whole Boeuf Basin Floodway was going to be swept and flooded, then I wouldn't want land in that spillway"* (Dabney, R. 221-223).

(7) *"I live in Chicot County. I understand that the fuse plug of the Jadwin Plan, in front of the area I have referred to as the Boeuf Floodway, has not been completed, and the Boeuf Floodway has never been in an operative condition. \* \* \* Land in a floodway would not have as much value as land of the same type and character outside of the floodway where it is protected"* (Holland, R. 223-224).

(8) *"I am a city mail carrier. I bought 120 acres of land in the Boeuf Floodway about 1933, and have got most of it in cultivation since I bought it. \* \* \* If the Government exercises its right to overflow my land, I expect \$100 an acre for damage to my cultivated land and \$25 an acre for the wood land"* (Farrell, R. 225).

(9) *"I am not familiar with the floodway area of the country and never go down there. I am not familiar with the value of land in the floodway"* (Cox, R. 225).

(10) *"I know nothing about the character or conditions of land in Desha County prior to the time I got there in 1930. I don't know anything about that spillway. If that land had flood protection I think it would be worth at least \$200 an acre"* (Stewart, R. 226).

(11) *"I do not own any land affected by the fuse plug levee nbr in the floodway. I do not think the pas-*

sage of the Flood Control Act of 1928 affected the market values of farm lands in the *territory around Dumas*, about 30 miles from *Arkansas City*. I am a druggist" (Meador, R. 226-227).

(12) "In 1930 I bought a little land near Watson. *It is not in the Boeuf Floodway*. My lands were overflowed from the Arkansas River in 1927, but are now protected by the 1928 grade and section levees which have been built on the South bank of the Arkansas River" (Rana, R. 227).

(13). "I have been approached to be one of the appraisers for flowage rights in Desha County. I have recently bought very fine land that cost me anywhere from \$1 to \$10 an acre in the woods. I have developed the land myself. I do not know when the plaintiff bought her land. If she paid \$100 an acre for it in 1927 I think she paid the fair market value. *My idea is that the Boeuf Floodway as designed by the Flood Control Act of May 15, 1928, has never become operative*. I have never considered what would be the fair damage to land if the floodway ever becomes in a condition to actually function as a floodway because I never did think the original plan would go through" (Gould, R. 227-228).

(14) "We took statements of Mr. Cain, Mr. Rana, Mr. Meador, Mr. Davis and Mr. Holland, who have testified, *on a boat in the Mississippi River, in the presence of certain Government Engineers and attorneys*. I have not told any of these witnesses that the Boeuf Floodway under the Jadwin Plan had been abandoned" (Kirten, petitioner's attorney, R. 228).

with easy access to an adjacent thriving market and good schools. *No witness* has suggested that there was any more attractive or valuable 40 acres of land for farming purposes in the entire alluvial valley of the Mississippi River. *No witness* dared deny that during the year 1929, after it was generally known that this land was in the Boeuf Floodway, and while the rest of the country was enjoying the peak of prosperity when respondent had the right to sell her land at peak values, respondent's land in fact *then* had practically *no market value*.

Therefore, when the Court examines the record of *all* of the testimony anent the amount of just compensation to which respondent is entitled, and carefully analyzes its purport, *competency* and weight, we are sanguine in the confidence that this Court will conclude that *respondent's evidence on this point stands substantially undisputed and uncontradicted*.

(b) *Petitioner's Incompetent Evidence*. The rules of law which qualify a witness to testify as to values are simple, clear and well established. "*After a witness has testified that he knows the property and its value, he may be called upon to state such value.*" ORGEL on VALUATION under EMINENT DOMAIN, p. 444, Note 50, and decisions *passim*. See Subject Index of this brief, Point XI, 3, "Evidence anent Values."

Measured by this simple standard, *petitioner offered no qualified witness* on the issue of the amount of respondent's award. Presumably it could find none to dispute the truth of respondent's testimony.

The Government did offer a number of witnesses who testified about values in *Chicot County* of lands wholly in-



*comparable* to respondent's property. The property values discussed by most of the witnesses involved *remote lands at remote times*. Some of the witnesses had been actually approached by the Government for employment for the very purpose of securing flowage rights at the lowest possible cost. In an effort to create the impression of an active market, they testify of a vast influx of "donators" and "squatters" who swarmed into the area as hungry vultures over the wreckage of values destroyed by the Flood Control Act of May 15, 1928, hoping the Court would believe therefrom that values in the area had been greatly increased as the result of a rapidly swelling population. Petitioner was not fair enough to state *at what price* the market existed. The record is clear that these insolvent donators were buying forfeited tax titles from the State at \$1 per acre. The record is undisputed that lands adjoining respondent's property which had been worth from \$40 to \$50 an acre before put in the floodway were actually so sold at \$1 per acre. Lands which had been worth from \$100 to \$125 an acre before being sacrificed for a floodway were sold after the "taking" for \$10 to \$15 an acre. Yes, after the creation of the Boeuf Floodway, a market was created by the squatters who preyed upon the economic wreckage as ghouls upon the dead—a market existed but **AT WHAT A PRICE!**

(c) *False Premises*. But the most astounding fact disclosed by an examination of petitioner's testimony, which *completely destroys its evidentiary value*, is the frank admission of the witnesses that their testimony is based upon *three definitely false premises*. A false premise necessarily results in a false conclusion. These three premises, false in fact and law, upon which petitioner in-

duced its witnesses to rely, are: (1) that the Boeuf Floodway has never yet been created, and (2) that the Army Engineers will never permit the fuse plug levee to crevasse during a flood, and (3) that there is no occasion for present alarm because the United States will undoubtedly pay all actual damages sustained if, as and when the Boeuf Floodway is ever used. Of what possible value can be the opinion of such hopelessly misinformed witnesses? *Falsus in uno, falsus in omnibus.*

No argument is necessary to convince this Court that any witness who testifies that the placing of property in a floodway designed to flow 1,250,000 cubic second-feet of water, a volume more than six times the flow of Niagara Falls (R. 146), has no effect upon its market value, and that the witness had just as soon have his home within as without such a floodway, is either pitifully uninformed, or else a deliberate scoundrel, and in either case altogether incredible. No witness so testifying could understand that the fuse plug levee, as a matter of law, was created expressly "*TO INSURE that excess water will leave the main river*" at that point (Doc. 90, sec. 118, R. 124) in order to give complete protection to "the remainder of the alluvial valley" (Doc. 90, sec. 121, R. 124).

Proof of (a), (b) and (c), of this Point, absolute and unequivocal, is found in the record as follows:

(1) "I live in Chicot County. I do not know the plaintiff's land and am unable to compare the market value of the plaintiff's land with the Mason Lake place . . . . Damn it, no sir, I don't think it has been damaged by being in the floodway. . . . I think the War Department will hold that levee there. . . . I would think

*they would go ahead and fight against the Mississippi side.*

\* \* \* *If the Government stands there and lets that fuse plug go out I think the Government would pay all the damage done. \* \* \* If they let water get in the floodway under the Markham Plan I think the flowage rights are worth something. It would change the fuse plug levee. I have been approached by the Government to enlist my services as an appraiser of the flowage rights that the Government is seeking in the floodway"* (Matthews, R. 210-212).

Could any assumed premises be more completely erroneous, resulting in any conclusion more valueless?

(2) *"I live in Chicot County. I have never lived in Desha County. I am not familiar with market values in Desha County prior to 1927. I did not pay any cash for the lands I bought in Arkansas in 1927 but just assumed the mortgage debt. \* \* \* I had just as soon have land in the floodway as out of the floodway because after they have completed the floodway these lands in the floodway are going to be paid a reasonable price for it, and we will have more protection than the others on the outside. If the Government takes any of my land to use it in a spillway I expect to pay for it. I do not feel that my land is in either one of the spillways. I feel like I am only in the proposed spillway. We have been protected. I had some conferences with the Army Engineers at Vicksburg. My statement that the floodway has had no effect on the market value of my land is based first on the fact that I do not think we are yet in any operative spillway, and second when we get in an operative spillway and my property is actually damaged the Government will compensate me. That is the way I feel about it. Any time you turn the*

on the War Department \* \* \*. Those people have still got their case in court under section 4 of the 1928 Act" (Col. Graves, May 1, 1936, R. 148, 149).

*"The Government has built levees, and under its right of eminent domain has taken levees, for the purpose of diverting waters over lands heretofore protected from flood waters \* \* \*. The taking of such lands and property has destroyed values"* (Arkansas General Assembly, March 6, 1935, R. 152-153).

Regardless of what happened elsewhere, there cannot be the slightest reasonable doubt but that the respondent actually paid \$100 per acre for her forty acres of land on January 10, 1927, (R. 180), thereafter placed upon it improvements to the value of \$25 per acre (R. 182), giving it a total fair market value of \$125 per acre immediately before it was placed by the Government in the Boeuf Floodway (R. 181); and that immediately after it became generally known that it was in the Boeuf Floodway as created by the Flood Control Act of May 15, 1928, it could not have been sold for more than \$10 or \$15 per acre (R. 180); and that this actual loss of \$100 per acre continued, while the depression came and went, to the date of trial (R. 180). This loss is solely attributable to the Flood Control Act of May 15, 1928, (Sponenbarger, R. 179-182; Hopson, R. 185; Baxter, R. 192; Thompson, R. 195; Parker, R. 197; Clayton, R. 201; Zellner, R. 202; Neal, R. 203; Courtney, R. 204; T. A. Prewitt, R. 205; Mann, R. 206; B. C. Prewitt, R. 207; Matthews, R. 208; Zebold, R. 210; Whittaker, R. 266; Harris, R. 266-267; Snyder, R. 268; Riley, R. 269; Mrs. Courtney, R. 269; Furlong, R. 269-270; Price, R. 270).

Each of these witnesses qualified by testifying to long *personal familiarity* with respondent's identical *40 acres of land involved in this suit*, and with actual sales and market values in that *immediate vicinity*. Their testimony related to *this particular land*, and its market value *immediately before and after its taking* by the Government for a floodway. Each of respondent's witnesses qualified squarely within the rules of competency as announced by all the authorities.

*Petitioner's lay testimony on values*, on the contrary, violated all of the rules of competency and is most amazing in its utter incredibility. There is absolutely *no substantial contradiction* to respondent's testimony establishing her loss.

(a) Not a single reputable witness, *qualified to testify*, disputed the overwhelming mass of testimony offered by respondent fixing her measure of damages at approximately \$100 an acre, to which transcript references have just been given above. Most of petitioner's witnesses admitted frankly that they *had never seen respondent's property* and *knew practically nothing about it or its value*. *No witness* testified that respondent did not in fact pay \$100 an acre for her property in January, 1927. *No witness* disputed the fact that immediately thereafter respondent spent \$25 an acre in buildings and improvements on the property. *No witness* testified that respondent paid more for her property than its fair market value at the time of its purchase. *No witness* denied that respondent's 40 acres of land was outstanding and unique in its value because of its unusual fertility, its excellent drainage, its commanding location on an interstate improved highway



**Respondent's Right to Recover SANS CONDEMNATION  
Proceedings by the Secretary of War.**

Section 4 of the Flood Control Act of May 15, 1928, authorizes the Secretary of War, in his discretion, to cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, rights-of-way, or flowage rights which may be needed in carrying out the adopted project (Jadwin Plan); but the failure of the Secretary of War to exercise this right of condemnation does not destroy, or in any way impair, respondent's right to recover in her present action.

"The fact that the condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States. U. S. C. A. title 28, Sec. 41 (20)." *Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142.

In *United States v. Great Falls Manufacturing Company*, 112 U. S. 645, 5 S. Ct. 306, 28 L. ed. 846, the Court held:

"Where property to which the United States asserts no title is taken by its officers or agents pursuant to an Act of Congress, as private property, for public use, the Government is under an implied obligation to make just compensation to the owner.

"Such an implication being consistent with the constitutional duty of the Government, as well as with common

justice, the owner's claim for compensation is one arising out of implied contract, within the meaning of the statute defining the jurisdiction of the Court of Claims; *although there may have been no formal proceedings for the condemnation of the property to public use.*

"The owner may waive any objection he might be entitled to make, based upon the want of such formal proceedings and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, may demand just compensation for the property."

To the same effect are the decisions in *Roberts v. Northern Pacific Railroad Company*, 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873; *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327, 330, 43 S. Ct. 135, 67 L. ed. 287; *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637; *Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142, 143; *Great Falls Mfg. Co. v. Garland, Atty. Genl.*, 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527; and *United States v. Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539.

The foregoing authorities clearly establish the right of the respondent to maintain the present action regardless of the inaction of the Government's Department of Justice. The remedy of condemnation procedure, waived by the respondent, has necessarily become *functus officio*. The "taking" being now complete, and respondent having assented thereto by asserting her right to compensation, eliminates the essential facts requisite for jurisdiction in condemnation proceedings.

The constitutionality and validity of the Flood Control Act of May 15, 1928, is hereby expressly conceded.

While statutory evidence has been introduced showing the consent of the State of Arkansas to exercise all rights necessary to effectuate all Acts of Congress for the flood control of the Mississippi River (R. 156), this consent of the sovereign state was not necessary.

"The right of eminent domain may be exercised by the United States within the several states, so far as is necessary to the enjoyment of the powers conferred upon the United States by the constitution, and the consent of the State is not a condition precedent." 20 *Corpus Juris*, p. 530, Sec. 18, and numerous cases in footnotes 4 and 5.

2. The **FACTS**. The evidence is clear and overwhelming in establishing the amount of just compensation to which respondent is entitled in this case. The District Court erred in failing to adopt respondent's requested Finding of Fact No. 101 (R. 334) and Conclusions of Law Nos. 61 and 62 (R. 350), 24 (R. 339) and 17 (R. 337).

Petitioner's contention that the dedication of respondent's property as a part of the floor of the Boeuf Floodway, as a sacrifice to protect the balance of the alluvial valley, did not substantially destroy its market value is not only absurd as a matter of common knowledge and common sense, but is also irreconcilably inconsistent with the official admissions of those authorized to speak for the United States. Certainly the Congress has spoken clearly enough. See Point V, B, 2.

"The War Department has the utmost sympathy for an owner whose property is injured without compensation. It believes that such owners deserve equitable treatment and compensation for flowage easements over their lands.

These are the same conclusions reached by the Committee on Flood Control after extensive hearings. \* \* \* For the reasons heretofore given, *as a matter of law and equity, the obligation rests upon the United States*" (Report No. 985, House of Representatives, May 23, 1935, R. 144-145).

"I cannot find, with our appraisals all through the areas of the Boeuf \* \* \* what in fact are *the values that have been destroyed* by use of these flood confinements—I cannot find that as an appraisal the amount of money involved is less than about \$205,000,000" (General Markham, Chief of Engineers, February 27, 1934, R. 140). General Markham then recommends the payment of 75% or 80% of the market value for flowage rights as being just compensation in the Eudora Floodway (R. 145-146, 147). "I repeat that a million second-feet *must* be taken out of that river unless you are going to have more and more disasters \* \* \*. The United States is proposing that instead of having a sporadic indefinable crevasse somewhere—and that is always what we have had in the past—we definitely put it down with prediction, *and pay the flowage for that purpose, and pay nearly the real value* of every foot that is traversed by that water in that determined path" (Gen. Markham, Jan. 27, 1936, R. 146-147). "We are physically, deliberately putting additional flood water down in a certain territory, and thus *deliberately creating an obligation for the acquirement of those flowage rights*" (General Markham, May 1, 1936, R. 150).

"The 1928 Act said that the United States shall provide flowage for the additional destructive flood waters that pass by reason of diversion from the main channel of the Mississippi River, and *that puts a burden indirectly*

*are so unmarketable that an award of their market value would not constitute just compensation.* No court, for instance, would sanction a purely nominal compensation for an easement which is of great value to its owner, merely because it could not be sold to anyone else for the price of the paper on which it is recorded. If an apportionment of the market value of the fee simple is to be criticized at all, it must be criticized on the ground that it cannot result in an approximation to *indemnity*, and not on the irrelevant ground that it cannot result in a distribution of the compensation equivalent to the separate market values of the divided interests." *ORGEL etc.*, p. 359, Sec. 106.

"The judicial system of valuing property acquired in eminent domain proceedings rests on the constitutional provisions that *no private property shall be taken for public use without just compensation.* The statutes enacted pursuant to these constitutional requirements have generally referred to the 'value' of the property taken as the measure of compensation. The judicial decisions, too, have accepted 'value' as the standard, rather than some other criterion, such as costs."

"What do these statutes and these judicial opinions mean by 'value'? While the constitutional provisions refer to 'just compensation,' many of the judicial opinions state that the measure of compensation is '*what has the owner lost?*' Other opinions indicate that *the owner should receive the equivalent of what has been taken from him*, while in still others the courts say that *just compensation requires that the owner be put in the same pecuniary position in which he was prior to the taking.*" *ORGEL on VALUATION under EMINENT DOMAIN*, p. 808, Sec. 236.



### 3. Market Value at time of Taking.

Values of the respondent's property prior to 1927, and values thereof after 1929 are immaterial, and tend only to confuse the issue and prejudice her rights. The value, or lack of value, of other property remote from respondent's, of a different character and differently circumstanced, is of course wholly incompetent and highly prejudicial, misleading in the extreme.

On the question of compensation, and the amount of the judgment to be rendered by the Court in this action, the only question to determine is the fair market value of the respondent's property at the time of the alleged taking. Here there is no substantial conflict in the record. All other evidence in the case tending to show other values of disparate property at different times and places is incompetent, irrelevant, immaterial, confusing and prejudicial.

"The courts, however, have uniformly construed both of these forms of the 'just compensation' clauses as requiring, at the minimum, a compensation equivalent to the 'value' of the property 'taken,' determined as of the time of the taking." *ORGEL etc.*, p. 46.

"\* \* \* the phrase (market value) is highly ambiguous and is given a wide variety of meanings by both courts and economists. For the present purposes, the definition that suggests itself as most convenient is 'the price at which the owner might actually have sold the property at or about the time of the taking.'" *ORGEL etc.*, p. 51, Sec. 14.

"It is the invariable practice in eminent domain cases, to set a specific date as of which the property must be val-

to be taken, locate the public work and declare the appropriation, the owner becomes absolutely entitled to compensation, whether the public proceed at once to occupy the property or not."

*Cooley's Constitutional Limitations*, (7th Ed.) p. 818.

"The just compensation to which the owner of property taken for public purposes is constitutionally entitled is the market value of the property at the time of the taking contemporaneously paid in money."

*Olson v. United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236, 1237.

*United States v. New River Collieries Co.*, *supra*.

3. The "Compensation" must be based only on the Jadwin Plan.

Because the respondent was undoubtedly entitled to have her compensation based upon "*the market value of the property at the time of the taking contemporaneously paid in money*," it would be utterly illogical, and indefensible by any legal precedent, for the Court at this time to consider developments of any kind since the time of the alleged taking. Because of the rule of law just stated it necessarily follows that no change or modification of plans, no scientific discovery (especially such as the vague, undisclosed, esoteric, mysterious information about cut-offs which the Government's expert witness Mathis claims to be in the sole and exclusive possession of himself and associates at Vicksburg, R. 290), no changed condition of any kind or character, nor any other fact at the time of the taking unknown to the parties, can possibly be properly considered in the case at bar. The compensation awarded by the Court in this action must, therefore, be

measured by, and be based solely on, the plan authorized by Congress in the Flood Control Act of May 15, 1928, "the adopted project"—the Jadwin Plan. No other unanticipated, undetermined conditions could, by any human or legal possibility, have been within the contemplation of the parties at the time of the taking, *when compensation was due* and should have been paid.

"When a particular manner of construction has been stipulated for, or agreed upon, the damages should be assessed on the basis of such construction." *Lewis on Eminent Domain*, (3d Ed.) Sec. 712, at p. 1248; and footnote 78.

"The condemnor may bind itself to a specified plan of construction or specified use of the property; and have the damages assessed upon that basis." *Lewis on Eminent Domain*, (3d Ed.) Sec. 830.

The plans and specifications of a petitioner in a condemnation proceeding are binding on such petitioner. Without these it would be impossible to tell the character of the work to be done or the extent of the damage it would do.

*East Peoria Sanit. Dist. v. Toledo P. & W. Rd. Co.*, 37 Ill. 296, at p. 306, 187 N. E. 512, 89 A. L. R. 870.

*Annotation*, 89 A. L. R. 879-887.

*Jacksonville & S. R. Co. v. Kidder*, 21 Ill. 131.

*Cleveland etc. R. Co. v. Hadley*, 179 Ind. 429, 101 N. E. 473, 476, 45 L. R. A. (N. S.) 796.

2 *Lewis on Eminent Domain*, (3d Ed.) Secs. 713, 818, 825, 830, 845, and 846.

4. *Interest.* Of course, such award as the Court will make will include in the final judgment in this case interest from January 10, 1929, or the date of the taking.

*Seattle Mattress & Upholstery Co. v. Seattle*, 134 Wash. 476, 478, 236 Pac. 84.

*Schuylkill Nav. Company v. Thoburn*, 7 Serg. & R. (Pa.) 411.

"Just compensation includes *all elements of value that inhere in the property*, but it does not exceed the market value fairly determined." *Olson v. United States*, 292 U. S. 246, 255, 54 S. Ct. 704, 78 L. ed. 1236.

"When land is not constantly, but only at intervals, overflowed, the fee may be permitted to remain in the owner, subject to *an easement in the United States* to overflow it with water as often as may be necessary from the operation of the improvement." *United States v. Cress*, 243 U. S. 316, 329, 37 S. Ct. 380, 61 L. ed. 746.

*An easement* is defined to be "a right which one person has to use the land of another for a specific purpose." 9 R. C. L., pp. 735-736, Secs. 2-3.

"*An easement is property*, and is within the protection of the constitutional prohibition now under consideration. \* \* \* The right acquired by the defendants is subtracted from the plaintiff's ownership of the land. Whatever interest the defendants have acquired in this respect the plaintiff has lost. If what they have gained is property, then what he has lost is property. If the easement, *when once acquired*, cannot be taken from the defendants without compensation, can the defendants take it from the plaintiff in the first instance without compensation?" *Eaton v. Boston C. & M. Rd. Company*, 51 N. H. 504, 515, 12 Am. Rep. 147.

## 2. What is "Market Value"?

"Since then, the *market value* is the criterion of damages, we are led to inquire what is the market value? The word "market" conveys the idea of selling, and the market value, it would seem to follow, is *the selling value*. It is the price which an article will bring when offered for sale in the market. It is *the highest price* which those having the ability and the occasion to buy are willing to pay. The owner in parting with his property to the State is entitled to receive just such an amount as he could obtain if he were to go upon the market and offer the property for sale. To give him more than this would be to give him more than the market value and to give him less would not be full compensation. Of course, real estate is not like cotton, grain and other commercial products. It cannot be sold upon an hour's notice. To sell land at its market value *sometimes requires effort and negotiation for some weeks or even some months*. And when we say that the owner is entitled to receive the price for which he could sell the property, *we do not mean the price he would realize at a forced sale on short notice*, but the price that he could obtain *after reasonable and ample time* such as would ordinarily be taken by an owner to make sale of like property." *ORGEL on VALUATION under EMINENT DOMAIN*, p. 63, Sec. 19.

*Little Rock Junction Ry. v. Woodruff*, 49 Ark. 381, 390, 5 S. W. 792.

"'Fair market value' is a term of law, not of economics." *ORGEL etc.*, p. 260, Sec. 80.

"Much as the courts like to declare the 'market value of the property taken' as the measure of compensation, *they do not hesitate to depart from this measure, either in fact or in effect, when the condemned property rights*



"Just compensation to be awarded for the appropriation of lands by the United States *should not be confined to the value of the lands at the time of the taking*, but should include such addition thereto as may be required to produce the *present full equivalent of that value paid contemporaneously with the taking*, as by the addition of interest at a reasonable rate."

*United States v. Creek Nation*, 295 U. S. 103, 55 S. Ct. 681, 79 L. ed. 1331, 1332.

"This minimum (requirement of 'just compensation') includes the allowance of interest on the amount of the award *from the date of the taking to the date of the award of compensation*," *ORGEL etc.*, Sec. 5, p. 18; and footnote 20.

*Jacobs v. United States*, 290 U. S. 13, 17, 54 S. Ct. 26, 78 L. ed. 142, 96 A. L. R. 1.

*Seaboard Airline Ry. Co. v. United States*, 261 U. S. 299, 306, 43 S. Ct. 354, 67 L. ed. 664.

*Phelps v. United States*, 274 U. S. 341, 47 S. Ct. 611, 71 L. ed. 1083.

*Brooks-Scanlon Corporation v. United States*, 265 U. S. 106, 44 S. Ct. 471, 68 L. ed. 934.

5. *Costs.* The appellant is also entitled to judgment for all her costs incurred in this action.

"Costs are allowed against the United States in a suit brought under the Judicial Code, Sec. 24 (20)"—the Tucker Act. *United States v. Cress*, 243 U. S. 316, 37 S. Ct. 380, 61 L. ed. 746, 754-755.

**MEASURE OF DAMAGES:** Difference in Market Value.

1. While it is not strictly accurate to speak of "*damages*" in connection with a suit for recovery under the

provisions of the Fifth Amendment, because strictly speaking and technically the United States is not liable for "damages," nevertheless the decisions habitually refer loosely to the yardstick for the admeasurement of the constitutional "just compensation" as being the "*measure of damages*" which respondent is entitled to recover. This measure of damages is the difference between the market value of respondent's property before and after the taking by the Government; or the difference between the value of respondent's land free from, and subject to, the rights taken.

"When the defendant has already entered upon the property, and has depreciated its value thereby, *the measure of damages is the difference between the fair market value of the whole property at the time of the condemnation and the present market value of the property left with the structure thereon.*" 10 R. C. L., p. 129, Sec. 112.

When the fee which is left in the owner "has a real and substantial value, the condemning party is not bound to pay the full value of the land taken, but merely *the decrease in market value* that is due to the imposition of the public easement; in other words in awarding compensation the value of the interest in the land remaining to the owner is to be deducted from the (total) fair market value of the land." 10 R. C. L., p. 134, Sec. 117.

"The plaintiff's damage for the taking is the difference between the value of the land free from, and subject to, the rights taken." *Emmons v. Utilities Power Company*, 83 N. H. 181, 141 Atl. 65, 67, 58 A. L. R. 788.

*Alabama Power Company v. Carden*, 189 Ala. 384, 66 So. 596.

sary to reinstate him in his business or in a new home." *ORGEL on VALUATION under EMINENT DOMAIN*, p. 822.

The instant case effectively illustrates the truth of the foregoing statement by Mr. Orgel of hardships incident to the arbitrary exercise of the sovereign power of eminent domain. Regardless of the amount of the award made by the Court in this case, it is doubtful that this respondent will be sufficiently reimbursed even for the actual, unusual cost to her of this particular litigation, to say nothing of her actual loss and the delay and uncertainty of the date of payment.

*"The law of eminent domain deals with the most drastic interferences of government with private property; interferences so severe that they are closely hemmed in by strict constitutional safeguards as to compensation. The problem of compensation is not merely an ethical one; it is also psychological and economic."* *ORGEL etc.*, p. 836, Sec. 242.

*"The paramount law intends that the owner shall be put in as good condition pecuniarily by a just compensation as he would have been if the property had not been taken. . . . No private property may be appropriated to public use unless a full and exact equivalent for it be returned to the owner."*

*Olson v. United States*, 292 U. S. 246, 254, 255, 54 S. Ct. 704, 78 L. ed. 1236.

*United States v. New River Collieries Co.*, 262 U. S. 341, 43 S. Ct. 565, 67 L. ed. 1014.

*A judicial question.* The determination of what constitutes this just compensation is purely a judicial question.

*"The ascertainment of compensation is a judicial function and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard."*

*United States v. New River Collieries Co.*, 262 U. S. 341, 343, 43 S. Ct. 565, 67 L. ed. 1014.

*Monongahela Navigation Company v. United States*, 148 U. S. 312, 327, 13 S. Ct. 622, 37 L. ed. 463, 468.

*"As was said by the Supreme Court of Nevada: 'No Legislature can diminish by one jot the rotund expression of the Constitution' requiring just compensation. Virginia & T. R. Co. v. Henry*, 8 Nev. 165. *'Just compensation is a fair and full equivalent for the loss sustained by the taking for public use.'*"

*Cribbs v. Benedict*, 64 Ark. 555, at p. 559, 44 S. W. 707.

## 2. When "Just Compensation" is due.

In the instant case the petitioner United States should have paid the respondent the just compensation to which she is entitled immediately after the dedication of her property as a floodway became definitely fixed as a matter of law, viz., on January 10, 1929, or certainly within a reasonably short time thereafter.

*"While the owner is not to be dis-seized until compensation is provided, neither, on the other hand, when the public authorities have taken such steps as finally to settle upon the appropriation ought he to be left in a state of uncertainty, and compelled to wait for compensation until some future time, when they may see fit to use his land. The land should be either his or he should be paid for it. Whenever, therefore, the necessary steps have been taken on the part of the public to select the property*

lar limitation on the power of all the States." *ORGE* on *VALUATION* under *EMINENT DOMAIN*, p. 4, Sec. 1.

"This requirement (just compensation) determines the *minimum basis of compensation* throughout the entire United States." *ORGE* on *VALUATION* under *EMINENT DOMAIN*, p. 18.

"The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

*Constitution of the State of Arkansas* of 1874, Art. II, Sec. 22.

*Little Rock & Fort Smith Ry. Co. v. Greer*, 77 Ark. 387, 392; 96 S. W. 129.

"Just compensation is a fair and full equivalent for the loss sustained by the taking for public use." *Cribbs v. Benedict*, 64 Ark. 555, 559; 44 S. W. 707.

"It is a principle of natural justice, as well as constitutional law, that no one can be lawfully deprived of his property without his consent, or having compensation allowed him by due course of law."

*Brown v. Morison*, 5 Ark. 217.

*Roberts v. Williams*, 15 Ark. 43.

*Memphis etc. Ry. Co. v. Organ*, 67 Ark. 84, 89, 55 S. W. 952.

*Cairo etc. Ry. Co. v. Turner*, 31 Ark. 494, 500.

*Ex parte Martin*, 13 Ark. 198, 206-207, 209.

*Louisiana etc. Ry. Co. v. State*, 85 Ark. 12, 106 S. W. 960.

*State v. St. Louis, etc., Ry. Company*, 85 Ark. 422, 424, 108 S. W. 508.



# 1. What is "Just Compensation"?

"'Just compensation,' say the courts of this country including the highest court, is a *compensation sufficient to make good the loss of the owner*. In the words of Mr. Justice Butler, the owner is '*entitled to the full money equivalent of the property taken, and thereby to be put in as good a position pecuniarily as it would have occupied, if its property had not been taken.*'"

ORGE on VALUATION under EMINENT DOMAIN, p. 146.

*United States v. New River Collieries Company*, 262 U. S. 341, 43 S. Ct. 565, 67 L. ed. 1014.

*United States v. Chicago, Burlington & Quincy Rd. Co.*, 82 Fed. (2d) 131, 106 A. L. R. 942; cert. denied 298 U. S. 689, 56 S. Ct. 957, 80 L. ed. 1408.

"Still another reason for the apparent excess of condemnation awards over the strict market value is that the sympathy of the court is likely to be on the side of the dispossessed property owner. And this sympathy is usually warranted and justified by the facts. Not only is the owner deprived of his property by compulsory process, but defects in condemnation procedure often impose very severe hardships upon him. Under the system of condemnation by administrative order, title to the condemned property vests in the condemnor at the outset of the proceeding. Here the principal hardship is the delay in the determination of compensation and in the postponement of payment. Although the owner is entitled to interest for the delay, this is often insufficient to repay him for his loss, for the uncertainty of the date of payment and of the amount of compensation makes it difficult, and in some cases impossible, for him to secure the financing neces-

(15) "I have never lived in the State of Arkansas and have no personal familiarity with any of the conditions in Desha County or Chicot County. I know nothing about the conditions, or difference in fertility, of either of the tracts of land referred to, nor have I any idea of the conditions which led up to the transactions about which I have testified. Only ten of the transactions to which I have testified are in Desha County, and I do not know how many of them represent sales made by The Federal Land Bank in comparatively recent years for the purchase price of which they merely took mortgages back" (Bayley, R. 234-235).

(16) "I am an employee of the Vicksburg United States Army Engineering District, and have prepared graphs showing the trend of cotton production in the floodway area in Desha and Chicot Counties. The cotton production figures I have given cover all of each of the counties named, and are not limited to the area within the proposed Boeuf Floodway. My figures are based on ginning reports for the entire county, regardless of where the cotton came from" (McWhorter, R. 235-237, 399, 401).

These are ALL of the witnesses offered in the trial court by petitioner on the issue of values, as affecting respondent's *actual loss*. We seriously and respectfully submit that the offering of such inane testimony, condemned to incompetency on the face of it, verges on manifest contempt for Justice and of the Court to which it is offered. Such amphogoric fiddle-faddle is significant only in loudly proclaiming that, notwithstanding its inexhaustible resources, the petitioner was unable to defend against the

truth of respondent's charge with any competent or credible testimony.

The trial court erred in refusing respondent's requested Conclusions of Law Nos. 48 and 49 (R. 346).

### 3. **AUTHORITIES** on compensation.

The Fifth Amendment to the Constitution of the United States provides:

"Nor shall private *property* be *taken* for public use, without *just compensation*."

We have discussed at length, and somewhat exhaustively as well as authoritatively, the meaning of the words "*property*" and "*taken*." See Point V, B, 4. These conclusive authorities impel the inescapable conclusion that respondent's *property* has been *taken*. Every requirement of the established legal principles involved, and of fair reasoning, has been met and discharged by the indubitable record facts.

Therefore, we now reach the practical consideration of what is meant by the words "**JUST COMPENSATION**" as found in the Fifth Amendment. What shall be the yardstick by which the Court shall determine the actual award to be made the respondent in this case?

"It is the law of the land, in the United States, that property shall not be taken for a public purpose without the payment of 'just compensation.' The Fifth Amendment to the Federal Constitution expressly imposes this limitation on the power of Congress, and the Fourteenth Amendment, while devoid of this specific language, has been interpreted by the Supreme Court to impose a simi-

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Recovery in condemnation is limited to damages, present or prospective, arising from *risks or hazards* known or reasonably to be expected to result from construction and maintenance of the improvement in a proper and legal manner.

*Missouri R. & L. Co. v. Creed*, 325 Mo. 1194, 32 S. W. (2d) 783, from 30 S. W. (2d) 605.

"Past as well as *probable future injury* to the lands flowed, should be assessed in *proceedings to condemn the right of flowage*."

*Doty v. Johnson*, 84 Vt. 15, 23, 77 Atl. 866.

"*Absolute certainty as to the damages sustained need not be shown*, but all that the law requires is that such damages be allowed as in the judgment of fair men directly and naturally result from the injury for which suit is brought."

*Hetzel v. Baltimore, etc., R. Company*, 169 U. S. 26, 18 S. Ct. 255, 42 L. ed. 648.

"The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof."

*Olson v. United States*, 292 U. S. 246, 257, 54 S. Ct. 704, 78 L. ed. 1236, at p. 1245.

"Flooding the property was not a taking where the property was already acquired for and dedicated to that purpose."

*Mullen Benevolent Corp. v. United States*, 63 Fed. (2d) 48, 56.



### 7. Fears and Apprehended Hazards.

Various counsel for petitioner have seen fit, from time to time, to argue, somewhat sarcastically, that respondent has as yet suffered *no real damage*, but that she seeks to recover for some sort of psychological loss based on ghostly fears and intangible hazards. Counsel apparently have no proper conception of the implications and import of the term "market value," so clearly established by the authorities hereinbefore cited. On proper occasion when to the benefit of their client, doubtless these same counsel would be quick to correctly plead and prove the legal fact that in the ultimate analysis *values are almost entirely mental*. When Columbus discovered America, the lands of the alluvial valley of the Mississippi River, including respondent's property, were just as fertile and desirable as they are today, but there was in this rich valley neither *property* nor *value*. No person was present who *desired a property right* in the land sufficient to pay \$100 per acre therefor, as did respondent on January 20, 1927. That the market value of respondent's property was practically destroyed cannot be doubted. That such destruction of value resulted from "fears and apprehended hazards" is not at all material, as is undeniably declared by the Supreme Court of the United States in the case of *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287. Substituting only the word "floods" for "guns," the language of the Supreme Court precisely describes respondent's position as follows:

"There is no doubt that a serious loss has been inflicted upon the claimant, as *the public has been frightened off the premises by the imminence of the guns (floods).*"

*Portsmouth Harbor Land & Hotel Co. v. United States, supra.*

"No contract shall be entered into for the erection, repair or furnishing of any public building or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose." *Revised Statutes*, Sec. 3733; Title 41 U. S. C. A., Sec. 12.

Therefore, there is no way in which the Government could be compelled to close the crevasses. Not being compulsory, the repair of the fuse-plug levee would be a gratuitous thing not to be assumed by the Court in adjudicating the compensation to be awarded in this case.

"Privileges which are merely permissive and subject to the paramount right of revocation by the condemning party cannot be available of in reduction of damages."

*Old Colony R. Co. v. Miller*, 125 Mass. 1, 28 Am. Rep. 194.

*In Re: Board of Water Supply*, 109 N. Y. State 1036.

On the contrary, it is well established by all of the decisions in point that the respondent is entitled to have her damages assessed on the assumption of the most adverse flood conditions reasonably possible, the most extreme meteorological conditions including rainfall, wind and heat, the most extreme flood frequencies, the most extreme flood volumes and successive rises, and the most extreme flood durations which might reasonably be expected to occur from time to time in the future, remembering from past history that these conditions have been for many years consistently increasing in their disastrous results. Because if and when these possible things do occur there is no possible further relief for respondent. She has had her day in court. Her exclusive recompense for

such catastrophic calamities is *NOW*. The Court will constantly bear in mind that if, as and when the greatest possible disaster does overtake the respondent from the use of the Boeuf Floodway, even under the most unforeseen and unanticipated circumstances, still, having had her day in court, and the Government having acquired the flowage right, and having been "*PAID ONCE FOR ALL*," the respondent can never claim any further relief from the Government. *Mullen Benevolent Corp. v. United States*, 63 Fed. (2d) 48, 56. Small wonder, then, her property now has only nominal market value.

"The rule in condemnation proceedings is that *all damages, present or prospective*, that are the natural or reasonable incident of the improvement to be made, or work to be constructed, \* \* \* must be assessed, and *there can be but one assessment of such damages*." 20 *Corpus Juris*, p. 997, Sec. 394; and cases cited.

"In condemnation proceedings a landowner is entitled to recover for *all damages, present and prospective*, which may be known or may reasonably be expected to result from the construction and maintenance of the improvement in a proper and legal manner, since *there cannot be successive proceedings*." 20 *Corpus Juris*, 763, Sec. 225; and numerous cases cited.

"*All damages, past, present and future*, which naturally or necessarily or proximately arise from the taking, *whether they were in contemplation of the parties at the time or not*, \* \* \* are conclusively presumed to have been included in the compensation award in the condemnation."

*Lockhart Power Co. v. Askew*, 110 S. C. 449, 455, 96 S. E. 685.

The public no longer desires respondent's property in the *Government's floodway*. Therefore, the public will not buy. Hence, there is no market value.

All of the courts hold that *anything* which affects the mind of the average buyer of real property is competent evidence in determining the market value of land. See cases hereinafter cited, and innumerable decisions *passim*.

Counsel ignore the legal and actual fact that, when all is said and done, *market values of all kinds are purely mental*.

### "Values are Mental."

The reason upon which the decisions of all the courts are based is very clearly developed in a recent book by eminent scientists as follows:

"Another problem of psychological interest is that the values of the products of business, namely, commodities and services, are largely *mental* . . .

"*Human behavior in business*. Trade by which work, services, or goods are exchanged for other work, services, or goods, is business. And nearly all of our daily concerns revolve around it. And this *business goes on in men's minds*, not in offices, shops, or warehouses. Business is human behavior. It revolves around values and *values are mental*. Prices are merely measures of value in terms of money established when two minds meet as buyer and seller.

"A young Wisconsin farmer decided, in 1920, to add 40 adjacent acres to his farm. He paid \$5,000 for the land, securing \$2,800 of this amount from a first mortgage on his new property. In 1933 he still owed \$2,200 on the mortgage. He tried to sell the land but he could not get

enough to cover the mortgage, in fact he was unable to get an offer at all.

"This piece of land was intrinsically just as good in 1933 as in 1920. It was still 40 acres. It was just as fertile. It raised just as big crops and just as good ones. It was surrounded by the same neighbors. Nothing had changed in its physical or human environment. The tract was located exactly the same distance from its near-by trading city. This city was very nearly the same size as it was in 1920—about 38,000. The demands and needs of the city's population were just as they were in 1920.

"But this had happened. In 1920 every farmer wanted to buy land or add to his farm; in 1933 no one wanted to buy land. In 1920 there were more buyers than sellers; in 1933 there were far more sellers than buyers.

*"Values are mental.* The old basic law of supply and demand is partly physical, partly mental. The supply side is largely physical; the demand side is largely mental. *In determining values the mental demand side usually plays by far the larger part.* There may be a very small supply of a certain commodity, but if no one wants it, it has no value. If many people want it, it may have a fabulous price. \* \* \*

*"Not only are values mental. What is more, they are largely emotional.* You want a thing because you want it. You may think of reasons for it to justify your desires to your friends or to yourself. The desire moves you to buy.

"The New York Stock Exchange is perhaps the most sensitive large barometer of values in the United States. Sellers and buyers in large numbers are constantly face to face every moment of the business day. It is a constant balance or change of balance between the number of sellers and buyers. If the number of sellers increases and the



*Olson v. United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236, at pp. 1244-1245.

*Clark's Ferry Bridge Co. v. Public Service Commission*, 291 U. S. 227, 54 S. Ct. 427, 78 L. ed. 767.

2 *Lewis, Eminent Domain*, (3d Ed.) Sec. 707, p. 1233.

1 *Nichols, Eminent Domain*, (2d Ed.) Sec. 220, p. 671.

*New York v. Sage*, 239 U. S. 57, 61, 36 S. Ct. 25, 60 L. ed. 143, 146.

*National City Bank v. United States*, 275 Fed. 855, 860.

"The award is to be made for the fair market value for all available uses and purposes. The owner of lands is entitled to their fair market value for the most profitable use for which the property is available."

*Matter of City of New York*, 230 App. Div. 41, 243 N. Y. S. 63.

*Mississippi & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206, 208.

*Wetmore v. Rymer*, 169 U. S. 115, 18 S. Ct. 293, 42 L. ed. 682, at p. 686.

*Conneas v. Commonwealth*, 184 Mass. 541, 69 N. E. 34.

*Southern Ry. Co. v. Memphis*, 126 Tenn. 267, 148 S. W. 662, 41 L. R. A. (N. S.) 828.

*Muscoda Bridge Co. v. Grant County*, 200 Wis. 185, 227 N. W. 863.

*Raleigh v. Mecklingburg Mfg. Co.*, 169 N. C. 219, 85 S. E. 300, L. R. A. 1916a, 1090.

*Central Georgia Power Co. v. Mays*, 137 Ga. 120, 72 S. E. 900.

*In re New York etc. Co. v. Blacker*, 178 Mass. 386, 59 N. E. 1020.

*McCandless v. United States*, 298 U. S. 342, 56 S. Ct. 764, 80 L. ed. 1205.

6. Compensation once for all time and most possible damages.

Instead of following the curious, ingenious, vague and highly speculative suggestions of witnesses offered by the

petitioner that, years after the original taking, they are now hoping that respondent's original loss may be to some extent mitigated or modified, the actual rule of law is directly to the contrary.

"As the damages must be assessed once for all, \* \* \* the rule is that the damages are to be assessed on the basis of the most injurious mode of construction that is reasonably possible."

*Cleveland, etc., R. Co. v. Hadley*, 179 Ind. 429, 101 N. E. 473, 45 L. R. A. (N. S.) 796.

*Jacksonville & S. R. Co. v. Kidder*, 21 Ill. 131.

*Idaho & W. R. Co. v. Columbia Conference*, 20 Idaho 568, 119 Pac. 60, 38 L. R. A. (N. S.) 497.

1 *Lewis, Eminent Domain*, (3d Ed.) Sec. 389, p. 710, *et seq.*; and numerous cases cited.

The foregoing authorities emphasize the fact that the Court should not assume that crevasses in the fuse-plug levee hereafter occurring will be repaired; nor that proper authority for appropriations therefor will later be enacted into law; nor that proper authority and appropriations for future dredging made necessary by the experimental cut-offs will be made; nor any other such possible beneficial action may occur which the United States may, or may not, see fit to grant.

"No act of Congress shall be construed to make an appropriation out of the Treasury of the United States or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such Act shall in specific terms declare an appropriation to be made or that a contract may be executed." *Act of June 30, 1906*, 34 Stat. 764, Title 31 U. S. C. A., Sec. 627.

ued for purposes of fixing the compensation. The ordinary phrase is 'value *at the time of the taking*,' although the 'time of taking' may itself be fixed, sometimes by one event, sometimes by another." *ORGEL etc.*, p. 68, Sec. 20, and authorities cited in footnotes.

"While the language of the law or its construction is that *its value must be fixed as at the time of its appropriation or taking* of the property, still it is not right that you should subject these parties to the consequences of what we all suppose to be a temporary depression and stringency of the money market. If this were permitted it might have a great effect upon the value of this property. Therefore you will not take into consideration the state of affairs existing today, but \* \* \* relieving it from the pressure which may now be upon it. This rule applies more particularly to real estate."

*ORGEL etc.*, p. 79, Sec. 23 and p. 85, Sec. 25.

*United States v. Inlots*, 26 Fed. Cas. 490, 494, aff'd in *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449.

*National City Bank v. United States*, 275 Fed. 855, aff'd 281 Fed. 754.

*United States v. New River Collieries Co.*, 276 Fed. 690, aff'd 262 U. S. 341, 43 S. Ct. 565, 67 L. ed. 1014.

*C. G. Blake Company v. United States*, 275 Fed. 861, 864, aff'd 279 Fed. 71.

"*'Market value at the time of the taking*,' explicitly or implicitly identified with 'fair market value,' and accepted by all American courts in most cases, and by some American courts in all cases, is the proper measure of compensation when property is taken by power of eminent domain." *ORGEL etc.*, p. 112, Sec. 35.

*Tilden v. United States*, (D. C. La., 1934) 10 F. Supp. 377, 379.

*"The value of property condemned, by which compensation to its owner is measured, does not include any element resulting subsequently to or because of the taking."*

*Olson v. United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236, 1237, at p. 1245; and cases there cited.

A statute, like the Flood Control Act of May 15, 1928, must be construed by the Court and enforced in the light of conditions then existing and of circumstances leading to its passage. *United States v. Creek Nation*, 295 U. S. 103, 55 S. Ct. 681, 79 L. ed. 1331.

Therefore, we most earnestly and confidently submit, this Court will not concern itself with the mass of highly speculative, vague and uncertain testimony introduced into this case by the petitioner relative to the experimental cut-off program initiated by the Government a number of years after the alleged taking of respondent's property, nor with testimony relative to what *might possibly* happen under the provisions of the Overton Bill (Act of June 15, 1936) passed two years after the plaintiff filed her present action. When this incompetent evidence has been eliminated, the Court will discover that the petitioner is left without defense.

#### 4. Value to the Owner.

*"When property is taken, its value to the owner is the only strictly relevant value, and that market value is acceptable only to the extent that it may be taken as a rough, practical measure of value to the owner."* ORGEL on

*VALUATION under EMINENT DOMAIN*, Chapter III; and p. 146, Sec. 45.

"The value of the property to the Government for its particular use is not a criterion. *The owner must be compensated for what is taken from him*; but that is done when he is paid *its fair market value for all available uses and purposes.*"

"And Mr. Justice Holmes said in another case: 'The question is, What has the owner lost? not, What has the taker gained?'"

"In denying that value to the taker is the measure of compensation when property is taken for a public use, these statements express *the uniform law of the land.*"

*ORGEL etc.*, p. 257, Sec. 79; and p. 258, footnote 3.

*United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 81, 33 S. Ct. 667, 57 L. ed. 1063.

*Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 30 S. Ct. 459, 54 L. ed. 725.

1 *NICHOLS, EMINENT DOMAIN*, 663.

2 *LEWIS, EMINENT DOMAIN*, Sec. 706.

*Omnia Commercial Company v. United States*, 261 U. S. 502, 43 S. Ct. 437, 67 L. ed. 773.

"The value to the taker is clearly *irrelevant* as a measure of *the owner's loss*, and the courts refer to it only to exclude it from consideration." *ORGEL etc.*, Sec. 236, at p. 810, and at p. 815.

##### 5. Most Valuable and Profitable Use.

"*The courts are unanimous in admitting testimony on the adaptability of property for this use and for that, save for the familiar restrictions against the consideration of highly 'remote and speculative' contingencies.*"



"The owner of lands is entitled to their fair market value for the most profitable use for which the property is available."

ORGEL on VALUATION under EMINENT DOMAIN, Sec. 30, at p. 99; and Sec. 236, at p. 815.

*Matter of City of New York (Inwood Hill Park)*, 230 App. Div. 41, 243 N. Y. S. 63.

The owner must be compensated for what is taken from him; but that is done when he is paid for its fair market value of all available uses and purposes." ORGEL etc., Sec. 45, p. 146, footnote 58.

*United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 81, 33 S. Ct. 667, 57 L. ed. 1063.

"Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. . . . The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect the market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service."

It has hereinbefore been clearly established by numerous unimpeachable authorities that the "*Owner at the Time of Taking*" of the property, and that owner alone is, entitled to recover. Immediately upon "the taking," the right to just compensation becomes a *personal claim* vested in the then owner, which claim does not pass to any subsequent purchaser by conveyance of the land, which is subject to the easement taken. See Lewis, *Eminent Domain*, (3d ed.) p. 936; and cases there cited. In this case respondent has the *sole* legal privilege of enforcing this her *personal* right to compensation which abides in her alone. No other person is a proper party plaintiff or claimant in her action.

Owners of distinct interests in a tract of land, as for instance the respective owners of (a) *the fee*, (b) *an easement*, (c) *a mortgage*, or (d) *other lien* have *separate rights of action*; and may not be forced (or even permitted) to pool their interests and have the damages assessed in a lump sum, and awarded as if the land was the sole property of one owner.

"It (the Fifth Amendment) merely requires that an owner of property taken should be paid *for what is taken from him*.

*"It deals with persons, not with tracts of land.*

"And the question is, What has the owner lost? not, What has the taker gained? We regard it as entirely plain that *the petitioners were not entitled, as a matter of law, to have the damages extended as if the land was the sole property of one owner; . . .*"

*Boston Chamber of Commerce v. City of Boston*, 217 U. S. 189, 30 S. Ct. 459, 54 L. ed. 725, 727.

"Persons holding several distinct interests in the same parcel of land may either maintain an action jointly, or pro-

*ceed separately.*" 20 *Corpus Juris*, 1187; and numerous cases cited in footnotes.

"Two or more persons having distinct causes of action, although against the same defendant, *may not join as plaintiffs* in one suit, and it is immaterial that the causes of action arise out of the same transaction, or that they are kindred and depend upon similar facts." 47 *Corpus Juris*, p. 56, Sec. 115; and cases cited in footnotes.

"The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings."

*Chicago B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 31 S. Ct. 460, 55 L. ed. 521, at p. 526; and numerous other Supreme Court decisions there cited.

"\* \* \* a plaintiff has the right to prosecute his suit to final decision in his own way.

"\* \* \* the plaintiff may select his own manner of bringing his action.

"\* \* \* the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill of complaint, \* \* \* is to determine the \* \* \* character of the controversy \* \* \*."

*Chicago B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 31 S. Ct. 460, 55 L. ed. 521, 526.

Illustrations of recoveries allowed to plaintiffs on less than the entire, unencumbered, fee simple title to the land involved are found in such cases as:

*A. W. Duckett & Company v. United States*, 266 U. S. 149, 45 S. Ct. 38, 69 L. ed. 216, 217, (a leasehold in a dock).

*United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54 L. ed. 787, 789, (an easement of private right-of-way).

*Brainerd v. State*, 131 N. Y. S. 221, 225.

*Fitzhugh v. Chesapeake, etc., R. Co.*, 107 Va. 158, 59 S. E. 415, 17 L. R. A. (N. S.) 124.

*Stertz v. Stewart*, 74 Wis. 160, 162, 42 N. W. 214.

*Milwaukee, etc., R. Co. v. Eble*, 3 Pin. (Wis.) 334, 362.

"The commissioners are authorized to take into account the depreciated value or salable value of the land caused by the risk to be apprehended from fires (or floods) that may never occur."

*St. Louis, etc., R. Co. v. Mendoza*, 193 Mo. 518, 525, 91 S. W. 65, 66.

*Evans v. Iowa Southern Utilities Co.*, 205 Ia. 283, 218 N. W. 66.

*Louisville & N. R. Company v. Lambert*, 33 Ky. L. R. 199, 110 S. W. 305.

"In determining the value of land appropriated for public purposes the same considerations are to be regarded as in a sale of property between private parties."

*Mississippi & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206.

"The courts have generally accepted the estimates of qualified witnesses in proof of the market value of condemned land. . . . A witness may testify to the value before and after the taking or damage." *ORGEL, etc.*, Sec. 129, pp. 437-438; and Sec. 130, p. 439.

*Montana Ry. Company v. Warren*, 137 U. S. 348, 353, 11 S. Ct. 96, 34 L. ed. 681.

2 *Lewis, Eminent Domain*, Sec. 655.

4 *Wigmore, Evidence*, Sec. 1942.

*Lawson, Expert and Opinion Evidence*, 491.

"After a witness has testified that he knows the property and its value, he may be called upon to state such value. The means and extent of his information, and

therefore the worth of his opinion, may be developed at length on cross-examination."

*Montana Ry. Company v. Warren*, 137 U. S. 348, 354, 11 S. Ct. 96, 34 L. ed. 681.

*ORGEL, etc.*, Sec. 130, p. 444-445.

"It is not proper to give a witness a list of sales (or mortgages) and ask him to form a judgment based on the hypothesis that the list represents sales (or loans)." See R. 232-234.

*ORGEL, etc.*, Sec. 132, p. 450.

*Chicago, etc., R. Rd. Co. v. Heidenreich*, 254 Ill. 231, 239, 98 N. E. 567, Ann. Cas. 1913c, 266.

"Opinion testimony is a staple type of evidence in proof of value in condemnation cases.

"Expert testimony based upon all the circumstances is the accepted and perhaps the only practical method of proving market value in condemnation cases.

"Value witnesses are not required to be professionally engaged in real estate appraisal, nor are they deemed to possess peculiar powers of inference from stated facts. Their testimony is received if they show an acquaintance with the property and are informed as to the state of the market."

"The readiness with which the court accepts the owner as a witness may perhaps be taken to show that consideration in fact, though not in legal theory, is given to the VALUE TO THE OWNER."

*ORGEL, VALUATION* under *EMINENT DOMAIN*, Sec. 133, pp. 452-453; and cases there cited.

Evidence of other sales "must not be too remote in time" and "there must be no drastic change in market con-



ditions." *ORGEL, VALUATION under EMINENT DOMAIN*, Sec. 137, p. 464; and cases there cited.

"The courts that reject sales to the condemnor, while admitting evidence of other sales on direct examination, base their exclusion on the ground that a sale to a condemning party is in effect a *forced sale*, that at best it represents a *compromise*, and that consequently it furnishes no true indication of the price at which the property could be sold in the open market to a 'willing buyer'." *ORGEL, VALUATION under EMINENT DOMAIN*, Sec. 146, pp. 489, 492; p. 502; and cases there cited.

"The courts have consistently refused to accept official valuations as evidence of market value in condemnation proceedings. . . . The courts universally exclude the *assessor's valuation*." *ORGEL, etc.*, Sec. 153, pp. 517-518; and Sec. 150, p. 509.

*Springfield & Memphis Ry. v. Rhea*, 44 Ark. 258.

*St. Louis, etc., Ry. Co. v. Magness*, 93 Ark. 46, 123 S. W. 786.

Each of the foregoing well-known rules were strictly met by the witnesses heard in the trial court as produced by respondent herein. They were utterly ignored by petitioner and its witnesses.

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## POINT XII.

## PROPER PARTIES.

This action was instituted by Mrs. Julia Caroline Sponenbarger as the *sole plaintiff* (R. 4-16, 93). The District Court erred in granting the motion of petitioner to make additional parties plaintiff (R. 21, 25), for the reasons assigned in the protests of respondent (R. 26), Grady Miller as Receiver (R. 28), and Rowell, *et al.*, as Receivers (R. 30). The District Court erred in refusing respondent's requested Conclusions of Law Nos. 57, 58, 59 and 60 (R. 349-350).

"No past due taxes or assessments of any kind are due to the State of Arkansas, the Southeast Arkansas Levee District, the Cypress Creek Drainage District, or any other taxing authority" (Sponenbarger, R. 181). This fact is not disputed. There is no mortgage on respondent's land.

The respondent, **MRS. JULIA CAROLINE SPONENBARGER**, and the petitioner, the **UNITED STATES**, are the *only* proper parties in this action.

At this point, we pray the Court to consider and adjudge the following pleadings, viz.:

(a) "Assignment of Error Re. Additional Parties" filed by the respondent, Mrs. Julia Caroline Sponenbarger (R. 26); and

(b) "Appearance and Protest of Grady Miller as Receiver for the Southeast Arkansas Levee District" (R. 28); and

(c) "Appearance and Protest of Alex H. Rowell and William R. Humphrey as Receivers of the Cypress Creek Drainage District" (R. 30).

number of buyers decreases, prices go down. If the number of sellers decreases and the number of buyers increases, prices go up. Psychological *values* are constantly changing and in a very sensitive manner. The balance between buyers and sellers is hung on a very fine . . . t."

"CONTROLLING HUMAN BEHAVIOR" by Daniel Starch, Ph. D., Hazel M. Stanton, Ph. D., and Wilhelmine Koerth, Ph. D. "The Macmillan Company—1936," p. 11.

#### 8. Evidence anent Values.

Anything and everything which affects value in the mind of the purchaser is competent. Every consideration which would influence a general buyer is material. These are the things which create market value—the *desire* of the purchaser.

"The owner may show every advantage that his property possesses, present and prospective, in order that it may be satisfactorily determined what price it could be sold for upon the market."

*Kansas City Southern Ry. Co. v. Boles*, 88 Ark. 533, 115 S. W. 375,

*Little Rock Junction Ry. Company v. Woodruff*, 49 Ark. 381, 5 S. W. 792.

*Little Rock & Ft. Smith Ry. v. McGehee*, 41 Ark. 207.

"It is perfectly proper, therefore, for a witness . . . to include in his estimation *any and every feature and consideration which, in his judgment, would influence the general buyer.*"

*Indiana, etc. Co. v. Pennsylvania R. Co.*, 229 Pa. State 484, 487-488, 78 Atl. 1039.

"There is a very wide distinction between giving *damages* for such remote and possible injuries, and *compen-*

sating the owner for the actual depreciation of his property because of its exposure to such hazards and dangers. Whatever may cause the depreciation, the loss to the owner is the same. If, in consequence of its exposure to these remote injuries, the property is diminished one-half in value, then this decrease in value measures the actual loss to the owner."

*Snyder v. The Western-Union Rd. Co.*, 25 Wis. 60, 69.

In *Voight v. Milwaukee*, 158 Wis. 666, 670, 149 N. W. 392, it was claimed that plaintiff's property had been depreciated in market value by the construction of a viaduct and the deflection of trade and travel. The court said:

"Loss of trade by deflection of travel is not in itself a ground of recovery. That is because of the uncertain and speculative character of such damages. Where a deflection of travel with consequent loss of existing prospective patronage has actually diminished the market value of abutting property, so that a buyer would not pay so much for the property as he would in its former advantageous location, the damage becomes more certain, and the injured party recovers, not for his loss of trade, but for the diminution in market value of his property so located in the estimation of the buyers who make the market." *Voigt v. Milwaukee, supra*.

"No element should be excluded in arriving at the market value of premises which is customary for the business world to consider in determining such market value or which an ordinary prudent man would take into account before forming a judgment as to market value of the property which he is about to purchase."

*Wayne County, Ky. v. United States*, 53 Court of Claims 417, aff'd. 252 U. S. 574, 40 S. Ct. 394, 64 L. ed. 723, (an easement of a public road).

*Clark v. United States*, 67 Ct. Cls. 337.

*Chiesa & Co. v. City of Des Moines*, 158 Iowa 343, 198 N. W. 922.

*McGowan v. Milford*, 104 Conn. 452, 133 Atl. 570.

*Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267.

*Storms v. Manhattan Ry. Company*, 79 N. Y. S. 60.

*Hill v. Glendon, etc., Mining Company*, 113 N. C. 259, 18 S. E. 171.

*Reading R. Company v. Boyer*, 13 Pa. St. 496.

*Colcough v. Nashville, etc., R. Company*, 2 Head (Tenn.) 171.

*Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

*Parks v. City of Boston*, 15 Pick. 198.

*Jordan v. City of Benwood*, 42 W. Va. 312, 26 S. E. 266.

*Cayce Land Co. v. Southern Ry. Company*, 111 S. C. 115, 96 S. E. 725.

*Ranforth v. City of New York*, 183 N. Y. S. 629, aff'd. 183 N. Y. S. 956.

*Turner v. R. R. Company*, 130 Mo. App. 535, 109 S. W. 101.

*Peabody v. United States*, 231 U. S. 530, 34 S. Ct. 159, 58 L. ed. 351.

"The fact that the claimant's interest is less than the whole does not affect his right to compensation for land taken or damaged." 20 *Corpus Juris*, p. 653, Sec. 130.

"In an action to recover the value of the land taken it is no defense that a third person has an equitable interest in the property." 20 *Corpus Juris*, p. 1178, Sec. 540; *Whitecotton v. St. Louis etc. R. Co.*, 104 Mo. A. 65, 71, 78 S. W. 318.



"Each (owner of an interest of any kind in realty) is entitled under the Constitution to be compensated in damages for the amount of his interest taken."

*Mayor, etc. of Baltimore v. Latrobe*, 101 Md. 621, 631, 61 Atl. 203, 4 Ann. Cas. 1005.

*United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54 L. ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas. 680.

\* *ORGEL, VALUATION under EMINENT DOMAIN*, p. 374.

"The general rule is, both under the statutes and in the absence of statutory provision, that, where property is taken or injured under the exercise of the power of eminent domain, *the owner thereof at the time of the taking or injury is the proper person to initiate proceeding or sue therefor.*"

\* 20 *Corpus Juris* 1185, Sec. 545; and numerous decisions there cited.

*Kindred v. Union Pacific Rd. Company*, 225 U. S. 582, 32 S. Ct. 780, 56 L. ed. 1216.

\* *Roberts v. Northern Pacific Rd. Company*, 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.

\* "The right to compensation is a personal claim, and after it has once accrued *does not pass by a deed to the land.*"

2 *Lewis, Eminent Domain* (3d Ed.), p. 936, Sec. 517; and cases there cited.

*Roberts v. Northern Pacific Rd. Company*, 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.

\* 20 *Corpus Juris*, 847, Sec. 286; and numerous cases cited in footnote.

"These rules apply as well to flowage cases as to other forms of taking. If the owner of land flowed conveys, after the flowing and before the easement has been ac-

Sponenbarger, the respondent before this court, and the original defendant, the United States of America, the petitioner herein.

If it be argued that the result of the enforcement of this well established rule of law might expose the United States to numerous suits by the respective claimants, the confusion and difficulty in that respect would be entirely the fault of the United States. Prompt institution of condemnation proceedings by the United States against all parties in interest, as is contemplated and required by Section 4 of the Flood Control Act of May 15, 1928, would have obviated all such objections, resulting only in fair play, just compensation promptly paid, and happiness to all concerned. The Government, as plaintiff, could have controlled its own suit in its own way, naming all the defendants desired. Having failed to discharge its duty under the plain mandate of the Act, it cannot be now heard to complain when respondent seeks her remedy in her own rightful way.

As the court said in *Reading Rd. Company v. Boyer*, 13 Pa. St. 496, 500-501:

"It is of no force to allege that the defendant committing the damage may thereby be put to more expense by several proceedings. Those who inflict injury ought not to be solely regarded. *Those who suffer by the invasion of their private property are entitled to more consideration* in the adjustment of the remedy to their condition and circumstances. \* \* \* We think the objection to the proceeding of the life tenant for the damage done to her interest alone fails. *She was entitled to that remedy.*" 13 Pa. St. 496, at pp. 500-501.

So, in the case at bar, the respondent is entitled to enforce her remedy alone, as it is prayed in her original petition, without the interference, annoyance or confusion of other parties whom she did not involve by her complaint. 20 *Corpus Juris*, 1187-1188, footnote 17; and decisions *passim*.

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### CONCLUSION.

If petitioner has suggested any possible defense which has not been hereinbefore fully discussed, we assure the Court that it has been unintentionally overlooked. After all, the vital issues to be adjudicated on this appeal are quite simple, viz.: (1) has respondent's "property" been "taken"?; and (2) if so, what "just compensation" shall be awarded her, measured by the difference between the market value of *respondent's particular* 40 acres of land *before* and *after* the creation of the Boeuf Floodway by the Flood Control Act of May 15, 1928?

The entire record applicable to each of these two simple questions has been carefully reviewed and frankly discussed. *The case has been fully developed.* Respondent already has suffered inexcusably *long delay* at the hand of petitioner. Her constitutional right to "just compensation *contemporaneously paid* in money" (*Olson v. United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236), has already been inexcusably and unconscionably ignored far too long. To reach a just conclusion, at long last, in finally answering on this appeal the two simple questions stated, we respectfully submit that this Court will find from the

*quired, the right to compensation for the easement passes to the grantee. But the right to recover such damages as have been sustained up to the time of the conveyance remains with the grantor."*

2 *Lewis, Eminent Domain* (3d Ed.), p. 937, Sec. 517; and cases there cited.

"Separate suits cannot be maintained for damages by the owner, and persons subsequently acquiring the property, where the injury results from the construction of a permanent structure, but *the owner of the property at the time of the erection of the structure*, is entitled not merely to damages for past injuries, but is entitled, besides, to compensation for injury which his property will reasonably sustain in the future as the result of the permanent injury."

*Louisville & N. R. Company v. Lambert*, 33 Ky. L. R. 199, 110 S. W. 305.

"Granting the compensation here to be, what it certainly is, the price of a *perpetual easement*, it is impossible to imagine a title to it in a subsequent grantee of the land subject to the easement." \* \* \*

"The conclusion established by the decisions is \* \* \* that *the damage belongs to the owner at the time of the taking*, and does not pass to a grantee of the land under a deed made subsequent to that time, unless expressly conveyed therein."

*Roberts v. Northern Pacific Rd. Company*, 158 U. S. 1, 39 L. ed. 873, at pp. 876-877.

20 *Corpus Juris* 847, Sec. 286; and numerous cases there cited.

*Where only a part of the mortgaged property is "taken," or where the property is "damaged" but not*

"taken," the mortgagee's security is not completely destroyed, and it may not be even substantially impaired if the value of the remaining property gives a sufficient margin over the amount of the debt. In the case of a mere "damaging" it seems that the mortgagee, in order to establish his interest in the condemnation, must show that he did receive material damage.

*Federal Trust Company v. East Hartford Fire Dist.*,  
283 Fed. 95, 99.

*Knoll v. New York etc. R. Company*, 121 Pa. 467, 472,  
15 Atl. 571, 1 L. R. A. 366.

*ORGEL etc.*, Sec. 113, at pp. 382, 383 and 392.

Respondent having paid all taxes and assessments accruing and maturing against her land (R. 181), of course none of the taxing authorities made parties (R. 21-25) could, or attempted to, prove any separate or special loss to them.

It is clear from a careful study of the foregoing authorities that neither of the persons made party on motion of the Government can properly be considered as parties to the suit against their objection and protest. (R. 26-32).

There is no mortgage on any part of respondent's land. All taxes and assessments of every kind and character which had matured against appellant's land to date of trial below had been fully paid and such liens discharged (R. 181). None of the persons made parties by order of the court had any sort of title to any part of respondent's claim against the United States, nor any possible interest in it.

Therefore, we submit, notwithstanding the motion of the Government, the Court will now consider as parties to this action only the original plaintiff, Mrs. Julia Caroline



record that all of the respondent's requests for Findings of Fact and Conclusions of Law should NOW be granted.

As a matter of law, under the evidence submitted, respondent is entitled to judgment against petitioner in the sum of \$4,000, together with interest thereon at the rate of 6% per annum from January 10, 1929, until paid, and for all her costs incurred in this litigation. R. 334 (101) and 350 (61-62).

Respectfully submitted,

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# TO WHOM DOES THE RIVER (MISSISSIPPI) BELONG?

The river belongs to the nation;  
The levee, they say, to the state;  
The government runs navigation,  
The Commonwealth, though, pays the freight.

Now, here is the problem that's heavy,  
Please, which is the right or the wrong?  
When the water runs over the levee,  
To whom does the river belong?

It's the government's river in summer,  
When the state of the river is low;  
But in the spring, when it gets on a hummer  
And starts o'er the levee to flow,

When the river gets suddenly dippy,  
The state must dig down in its till  
And push back the old Mississippi  
Away from the farm and the mill.

I know very little of lawing,  
I've made little study of courts,  
I've done little geeing and hawing  
Through verdicts, opinions, reports.

Why need there be any more said,  
When the river starts levees to climb?  
If the government owns the aforesaid,  
It must own it all the time.

If the bull you are leading should bellow  
And jump over somebody's fence,  
There isn't much doubt you're the fellow  
Expected to bear the expense.

If it follows a Sunday School teacher  
And chases the maid up a tree,  
You're the owner, the same, of the creature,  
Undoubtedly all will agree.

If it's your Mississippi in dry time,  
It's yours, Uncle Sam when it's wet,  
If it's your Mississippi in fly time,  
In flood time it's your river yet.

Government would do to the land within the spillway, would be very much less than the damage of a controlled spillway because it would only be occasionally that the land would be covered in the fuse-plug floodway, and therefore the damage would not amount to anything. In fact, he contended there would be no damage at all. Those who differed with him, differed with him not altogether as to the kind of spillway that should be constructed, but I think, in fact I know, that the representatives of the people who were interested in this land thought there would be damage to the land with the uncontrolled spillway, and that the Government would have to pay the damages. What I mean by the word damages would be what the land was worth if actually used entirely, and also what flowage rights over it would be worth.

I think the bill as a whole contemplated not only the Government would pay owners for private property which might be actually taken for levee purposes as a right-of-way, or as in this particular case to construct side levees, but also that if there was damage to the land within a spillway, either in this spillway or in the Bonnet Carre spillway or the one in Missouri, the Government would pay these damages.

I think the only question to be determined is whether General Jadwin was correct when he said there would be no damage, or whether the owners of the land are correct in saying that the land is actually damaged.

The complaint alleges that there is damage and sets out specifically what it is. *I have no doubt in my mind that under the Flood Control Act whatever damage can be established can be recovered in a proper suit against the*

*government.* The fact that the plan itself contemplated that these lands should be used as a flowage way is sufficient to show that the damage comes from their actual taking for public use, and therefore is the same as if they had taken the entire land and used it for a right-of-way. The only difference being that the measure of damage in the two cases would be different.

I think it is solely a question of proving whether these lands are in fact damaged or not by permitting water to flow through this uncontrolled fuse-plug spillway. If there is damage, it constitutes a taking of the property within the meaning of that term as applied to the Tucker Act. I am sure that was the *intention*, and the *opinion* held by almost everybody in the Congress which passed the bill. *Nobody wants to take private property and use it for flood control purposes without the proper compensation being made.*

There is a contention that the damage ought to be borne by the States. But it was recognized that the land that would be used in Arkansas would be for the benefit of Louisiana, and, in fact, of all lands along the Mississippi that might be overflowed and, therefore, it would be unjust to require Arkansas to bear that burden. For that reason, it was left as it is here. In order that local influences might not have any word in determining what the damage should be, it was provided that a commission should be appointed to fix the damage. That was at the suggestion of the Government because, if it had not been for that provision, those suits would have, of course, been tried to a jury instead of a commission. *Nevertheless everything in the bill was intended to protect those who*

*were damaged* if in fact there was damage, that was occasioned by the carrying out of this plan for the controlling of floods along the Mississippi. If that is not accomplished by the wording of the bill, it is because those who were interested in its passage were mistaken as to the meaning of the language placed in it. *I am sure that was the meaning intended at the time of its passage.* All the difference was, and that difference was not to be settled by the bill, is, was the land within this fuse-plug spillway damaged, *was its value reduced by the use which the Government was going to make of it.*

*I think the demurrer ought to be overruled.*

This opinion of mine may be to some extent influenced by the fact that I am familiar with the local conditions and the prevailing idea of those who were vitally interested in the passage of this measure. That fact I do not think in any way affects the propriety of my passing upon the case, because that information can come as well from a study of the record as it does from the facts as they existed there.

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## APPENDIX B.

## I. NATIONAL RESPONSIBILITY.

The Flood Control Act for the first time in history, deliberately assumes NATIONAL RESPONSIBILITY for the execution of ONE single comprehensive plan for flood control of the Mississippi River in its lower, alluvial valley. It is one, entire, unified NATIONAL PROJECT.

The Congress advisedly, deliberately, intentionally and expressly accepted NATIONAL RESPONSIBILITY, exercising EXCLUSIVE NATIONAL CONTROL, assuming complete GOVERNMENT LIABILITY, thus by legislation reversing the rule of former judicial decisions, rendering prior judicial precedents inapposite, nugatory and obsolete.

"The Mississippi River is the Nation's drainage ditch. Its flood waters, gathered from 31 States and the Dominion of Canada, constitute an overpowering force which breaks the levees and pours its torrents over many million acres of the richest land in the Union, stopping mails, impeding commerce, and causing great loss of life and property. *These floods are national in scope* and the disasters they produce seriously affect the general welfare."

Republican Party Platform, 69 Cong. Rec., Part 2, p. 1730; also 69 Cong. Rec., Part 3, p. 3465.

"We hold that the control of the *Mississippi River* is a national problem. The preservation of the depth of its water for the purpose of navigation, the building of levees to maintain the integrity of its channel, and the prevention of overflow of land and its consequent devastation, resulting in the interruption of interstate commerce, the disorganization of the mail service, and the enormous loss

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## APPENDIX A.

**OPINION OF UNITED STATES DISTRICT COURT,  
Eastern District of Arkansas, Overruling Defendant's Demur-  
rer in Case of J. Caroline Sponenbarger v. United States.**

Honorable John E. Martineau, District Judge:

It was early recognized that it was not possible for the States bordering on the Mississippi to control it, and that the only practical method of controlling its floods, if they could be controlled at all, was by the United States Government. In the various discussions and considerations of the bill, there were two plans suggested with reference to this particular spillway. I think all authorities, the Chief of Engineers representing the Government, recognized that the old system of levees was not sufficient to control the floods and there should be a diversion of the water of the Mississippi at the time of high waters. It finally got down, so far as this particular part of the levee was concerned, as to whether there should be a controlled spillway which would be very narrow, and really constitute another channel of the river, or whether there should be a fuse-plug spillway which plan was finally adopted as was recommended by General Jadwin.

One of the principal considerations in determining which of these plans should be adopted was the cost of the lands that were included within the spillway. If it were a controlled spillway and narrow, naturally the lands within it would be damaged, but there would be less land than if an uncontrolled spillway were built. General Jadwin contended that if you adopted his plan, that is this fuse-plug spillway, the damage to the land, the injury the

of life and property imposes *an obligation which alone can be discharged by the Federal Government.*"

Democratic Party Platform, 69 Cong. Rec., Part 2, p. 1730; also 69 Cong. Rec., Part 3, p. 3465.

"This is all one country. The public needs of each part must be provided for by the public at large. \* \* \* An adequate plan should be adopted to prevent a recurrence of this disaster in order that the people may restore to productivity and comfort their fields and their towns. \* \* \* The Federal Treasury should bear the portion of the cost of *engineering structures for flood control* that is justified by the *national aspects of the problem* and the *national benefits.*"

President CALVIN COOLIDGE to Congress, 69 Cong. Rec., Part 7, p. 7126.

"Congress derives authority to protect the Mississippi Valley from floods from section 8 of the Constitution, reading as follows:

"The Congress shall have power \* \* \* to provide for the common defense and general welfare of the United States; to regulate commerce \* \* \* among the several States; and to establish post offices and post roads."

"The situation was expressed very forcibly by General Jadwin, Chief of Engineers, in a recent speech at St. Louis in which he said: ' \* \* \* Now a comprehensive plan must be substituted and *control must be national.*' \* \* \* Federal jurisdiction must extend to all phases of the improvements."

"And the only solution is for the *Federal Government to assume full charge.* \* \* \* There is only one way to achieve success, and that is for the Federal Govern-

ment to adopt 'an adequate' plan, as the President so wisely suggests—'a comprehensive plan,' in the words of General Jadwin—*assume entire control and pay all costs.*"

Senator RANDELL, (La.), 69 Cong. Rec., Part 1, pp. 938-939.

"The Louisiana Purchase was made by Jefferson largely because he believed it was *essential to national unity* that the Mississippi River should come into the possession and be made part of the United States. As far back as 1845 we find speeches from John C. Calhoun referring to the flood conditions of the previous year, which he then said were too great for local enterprise; that *their control was a duty to be undertaken by the Federal Government.*" \* \* \*

"In the Mississippi Valley live more than one-half of the entire population of the United States. The valley contributes to the national wealth 68 per cent of the exportable products. In the valley is *the industrial center of the Nation*, the agricultural center near the confluence of the Mississippi and Illinois rivers, and the center of population in southwestern Indiana near the Illinois line." \* \* \*

"The drainage basin of the Mississippi is larger than the area of the whole of continental Europe. It is the world's most precious area. Its development in less than 100 years is probably the most remarkable chapter in this history of national growth." \* \* \*

"So precedent must be set aside and the Nation take the problem fully in hand and solve it as a national problem at national expense." \* \* \*

"Today a private citizen can not build a boat, a dike, a bridge, a dam, or revetment without permission from



*the National Government. Its authority is supreme; its control absolute."*

Senator HAWES, (Mo.) 69 Cong. Rec., Part 4, pp. 4395-4396.

*"It (the Mississippi River Commission, a purely Federal Agency, with practically arbitrary power) held to the view that in support of the 'levees only' theory every outlet of the river but one should be closed, and did succeed in closing them all except the Atchafalaya Gap and the mouth of the river at the Passes. \* \* \* It has been described as the monumental blunder of the age. \* \* \* But it was planned and executed by the Federal Government. \* \* \* Thus it will be seen that a policy fixed by the Federal Government itself is largely responsible, if not entirely, for the prostration of the lower valley today."*

Congressman REID, (Ill.) (Chairman House Flood Control Committee), 69 Cong. Rec., Part 5, p. 5645.

*"The nation recognizes this as an obligation everywhere accepted save here in Washington. It would seem that it is just as much a duty to protect the country from the ravages of floods as from the incursion of hostile armies."*

Senator CARAWAY; (Ark.) 69 Cong. Rec., Part 4, p. 3915.

*"Flood control on the Mississippi River is a single problem, and its solution can be secured only by unified treatment. The Federal Government is the only agency capable of doing the job. \* \* \**

*"The evidence before the committee showed that Tennessee was dependent in part for its protection upon levees in Kentucky, Arkansas is dependent on works which*

must be located in Missouri, and Louisiana in turn on levees in Arkansas. If we are to fight the river flood successfully, we must ignore State and local lines, because the river ignores them. *We must have a comprehensive plan under unified control and direction.* The character and location of the works must be determined by the need of *the entire valley* and not by the locality where built. Missouri, for instance, does not want a floodway from Birds Point to New Madrid. *Arkansas does not want some of its fairest territory turned over to the Boeuf floodway.* \* \* \* But the greatest good to the greatest number must be the basis for determining the location of these works and *only a Federal agency can make these decisions* and, in making them, the agency must be unhampered by local conditions."

Congressman SWING, (Calif.) 69 Cong. Rec., Part 6, p. 6717.

"Too much praise can not be accorded to Chairman REID, of the House Flood Control Committee, for so courageously maintaining that flood control is a *national problem*, and insisting that the entire cost should be borne by the Federal Government. A like measure of praise should be accorded Chairman JONES, of the Senate Commerce Committee, whose skill and ability resulted in a unanimous report of his committee and an equally *unanimous vote in favor of the bill in the Senate.*" \* \* \*

"I congratulate the committees of both branches of Congress that have framed this legislation upon having reached the conclusions that flood control is a *national problem* and that *the entire cost should be borne by the Government.* There can be no flood control with divided authority. Either the Government must take over the

problem and solve it, or we must look forward to disasters even worse than that of 1927."

Congressman MARTIN, (La.) 69 Cong. Rec., Part 6, pp. 6724, 6726.

"The Mississippi River does not belong to any State. It does not belong to Illinois, or to Missouri, or to Louisiana. It belongs just as much to us in New York, who are as far removed from it as any people in this Union.  
• • •

"The assertion that the local juries of the South will mulct the Federal Government in condemnation proceedings and would make awards higher than in the case of proceedings started by the State or local communities is a false slander upon the great patriotic people of the South."

Congressman O'CONNOR, (N. Y.) 69 Cong. Rec., Part 6, p. 6782.

"We all understand from the White House to this House, and everywhere else, that this is a national project, and we must treat it as such."

Congressman BLACK, (N. Y.) 69 Cong. Rec., Part 7, p. 7111.

"The problem, therefore, is a problem that can be handled only by the *Federal Government*, and the Federal Government has been derelict in its duty to an astonishing degree and over a great period of time. • • •

"Moreover, the Government has followed the policy of limiting its work to navigation and improvements incident thereto. It has utterly ignored the greater problem and the greater duty of controlling the flood waters and protecting the adjacent lands and property from injury, a policy which has always seemed to me to be narrow and stupid to the last degree. • • • as the Govern-

ment asserted its jurisdiction over these streams, it was for that reason alone in duty bound to harness and control the waters over which it asserted its dominance. \* \* \* Apparently, it took the lesson of this frightful catastrophe to finally awaken a real interest and a real understanding of the magnitude of the question involved. \* \* \*

"But I inquire now why it was that Congress was not convened and the great arm of this Government stretched out to protect people who were in no wise to blame for their condition, *people who were suffering largely because of the acts of the Government itself*, for it is now a conceded fact that in seeking to improve the Mississippi River the Government engineers closed certain great outlets for flood waters and by that act increased the menace of the flood.

"This problem \* \* \* is *national* in scope and must be handled by the *National Government* if it is ever handled effectively."

Senator REED, (Mo.) 69 Cong. Rec., Part 5, pp. 5294, 5295, 5296.

"I believe the hearings developed fully the fact that it is a *national question* and must be dealt with from that viewpoint. Then the next conclusion naturally follows that *the entire cost of construction should be borne by the Federal Government* by congressional appropriation.

"It is a *national problem* and as such should be considered. *All whom I have heard before the committee agreed to the national aspect of this subject*, and the only difference I find is the question of the division of costs and the extent to which the bill should apply. \* \* \*

"In so far as flood control alone is concerned, I believe the entire cost should be borne by the Federal Gov-

ernment, for it is a Federal question and affects all our citizens."

Congressman SWANK, (Okla.), 69 Cong. Rec., Part 1, pp. 1065-66; and 69 Cong. Rec., Part 7, p. 7419.

"Such a national loss (1927 flood) is indicative of a *national responsibility for prevention*. \* \* \* The Federal Government can well afford the price. By paying the price a *national benefit is bought*. The Federal Treasury is protected since no other drainage system can present to Congress similar characteristics that will warrant *exclusive national aid*. \* \* \* the flood-control work of the Mississippi Valley should be a *national project—designed, constructed, and paid for by the National Government*."

Senator SACKETT, (Ky.) 69 Cong. Rec., Part 1, p. 773.

"It is a *national problem* and the expense must be borne by the United States Government, because the States are not able to raise the necessary funds, and complications would hazard the completion of a constructive flood-control program. \* \* \*

*"The maintenance and control of the flood ways should be in the hands of the United States Government*

"The Mississippi Valley is the bread basket of the Nation, and supplies the East, West, North and South with food supplies."

Congressman HULL, (Ill.) 69 Cong. Rec., Part 2, pp. 2261-2263.

"If it be the policy of the Federal Government, the wisdom of which I have yet to hear denied, to exercise control over every part of the Mississippi River, does not



this *exclusive right to absolute control* carry with it a *corresponding duty to keep that river within its bounds?*  
 . . .

“Mr. Chairman, commerce decrees, humanity urges, duty impels, common sense dictates, and justice demands that absolute, complete, and entire control of the floods of the Mississippi River and its tributaries be *vested solely and alone in the Government of the United States.*”

Congressman COLLIER, (Miss.) 69 Cong. Rec., Part 2, p. 1731.

“In justice to everybody in the United States the Mississippi River must be controlled through levees and outlets, and it is my judgment that *all of the people of the United States should pay for this*, and that not one dime should be expected as further contributions from the people who have been suffering this burden during all of these years.”

Congressman QUIN, (Miss.) 69 Cong. Rec., Part 6, p. 6709.

“In the very beginning I want to say that *there has been no difference of opinion as to the necessity for flood control*; . . . a recurrence of such a catastrophe should be made impossible. . . .

“The Mississippi River is, of course, the most important stream in the United States. It stands in a class entirely by itself. . . . The Mississippi Basin contains 1,240,000 square miles, or about 41 per cent of the continental United States, and includes—in whole or in part—31 of our States.”

Congressman KOPP, (Iowa) 69 Cong. Rec., Part 6, pp. 6709-6710

"The suggestion that flood control be thought of as a national problem is not new." \* \* \*

"The Mississippi is one of the world's greatest rivers. It discharges three times as much water as the St. Lawrence, twenty-five times as much as the Rhine, and three hundred and thirty-eight times as much as the Thames. It has 54 tributaries that are navigable by steamboat and hundreds navigable only by small boats. The total mileage of navigable waterways and tributaries is estimated at 15,000 miles. At 2,000,000 cubic feet per second, flowing for a day, its waters would cover 620 square miles to a depth of 10 feet, \* \* \* and is equal to six times the water passing over Niagara Falls. It deposits at its mouth each year a mass of soil and silt equal to a square mile in extent and to a depth of 260 feet. It 'eats' annually about 91½ acres for each mile of its length. Obviously, no community, no State, can control such a force."

Congressman NELSON, (Mo.) 69 Cong. Rec., Part 6, p. 6669.

"Having entered upon the hearings with an open mind and no preconceived opinions upon any phase of the questions involved, after listening to the testimony for nearly three months and attempting at all times to weigh same as I would if a judge upon the bench, I have reached a very definite and fixed conclusion that *the Federal Government should bear the entire cost of the control of the flood waters of the lower Mississippi*, and I shall try to present the reasons actuating me in reaching that decision. \* \* \*

"The American people have become convinced and are now demanding that *the Federal Government should assume the sole responsibility for locating, constructing,*

and maintaining works to prevent floods upon the lower Mississippi, and that *the Federal Government should pay the entire cost of same.* \* \* \*

"First. Because it is a *national problem*, and hence a *national obligation* and a *national duty* which the Federal Government should discharge. \* \* \*

"Fifth. Because it is the will of the American people, whose representatives we are, that *the National Government should pay therefor.*"

Congressman JOHNSON, (Texas) 69 Cong. Rec., Part 5, p. 5334.

"Some say that it is not the affair of the United States Government to do this work. But who can stand idly by and see that land devastated and depopulated, business interests destroyed, commercial intercourse cut off, and people starved and degraded?

"It may be the naked legal right of the United States Government to stand thus idly by, but if it does it is not worth the name. And those who do so say do not represent American sentiment; they do not represent American patriotism. \* \* \*

"The conscience of the whole country has been aroused by the frightful destruction in the lower valley. *Nothing less than an adequate, comprehensive plan of 100 per cent flood control without local contribution will satisfy the people of this Nation.*" \* \* \*

"\* \* \* the flood of 1927 brought to us the realization that the solution of this problem had gone beyond the power of individual States or communities and had become *the Nation's duty.*"

Congressman REID, (Ill.) 69 Cong. Rec., Part 5, pp. 5608, 5616.

"So flood control has been recognized as a *national problem*, although it has been treated by the Government as incidental to navigation."

Congressman RAGON, (Ark.) 69 Cong. Rec., Part 5, p. 5125.

"Flood control and flood prevention are *national*, not State or local problems."

Congressman LOZIER, (Mo.) 69 Cong. Rec., Part 5, p. 5464.

"\* \* \* the terrible catastrophe of 1927, please God and the efficient purpose of the American people, *shall never occur again*. \* \* \*

"\* \* \* there is a conviction that the problem shall be considered as a *national problem*, that the Nation shall take vigorous initiative, that the administration of flood control in the Mississippi Delta henceforth shall be and must be a *national administration*, and the program of relief shall be a perfected project, looking forward to protection against not only such a gigantic flood as that of 1927, but against super-floods 25 per cent greater."

"Upon these matters there is a unity of purpose, of spirit, of thought that approaches the *unanimous*."

Congressman DAVENPORT, (N. Y.) 69 Cong. Rec., Part 6, p. 6715.

"The commerce clause of the Constitution is sufficient warrant for *complete national responsibility*, \* \* \*"

"It is inconceivable that a nation would permit an area of 40 to 50 miles wide and a thousand miles in length to be carved out of its very heart and feel that no national duty was involved. On this *national* aspect the question of recurring periods of destruction of life and property

is offered. Under the general-welfare clause this Nation can not permit this condition to continue."

Congressman DRIVER, (Ark.) 69 Cong. Rec., Part 6, p. 6787.

"And what an empire this Mississippi Valley, with all its tributaries, is—an empire that produces more than 100,000,000 people can consume! Rome ruled the world from Egypt to the British Isles, yet her eagles could not fly in a straight line as far as from New Orleans to Helena, Montana. Alexander conquered the world and was triumphant from the summit of the Alps to the foot of the Himalayas, yet he could not march his invincible phalanx in a straight line as far as from Pittsburgh to Santa Fe, *all within the watershed of this mighty river.*"

Congressman GUYER, (Kan.) 69 Cong. Rec., Part 6, p. 6774.

"\* \* \* this is the greatest undertaking that has ever confronted the National Government. It is, indeed, a stupendous task, and the *solution of the problem of flood control will mean more to the economic welfare and safety of the Nation than possibly any other one act that the Congress can perform.* \* \* \*

"It really was not until 1917 that the Congress recognized flood control of the Mississippi River as a part of the *national responsibility.*"

Congressman SINCLAIR, (N. Dak.) 69 Cong. Rec., Part 6, p. 6775.

"You are in the same position of a man who has a wild bull or a savage dog. All you have got to do is to keep that wild bull within the pasture or that savage or that mad dog in the pen. *This river is the river of the*



*United States.* The State of Illinois or the State of Arkansas or the State of Louisiana has no jurisdiction over it, can not legislate in any way in regard to it, and yet it is permitted by the United States, the only agency that has control over it, to run wild and do this harm."

Congressman (Chairman) REID, (Ill.) 69 Cong. Rec., Part 6, p. 6796.

See also *McIntyre v. Prater*, 189 Ark. 596, 74 S. W. (2) 639, holding: "Where one knowingly keeps a vicious or dangerous animal, he is liable for injuries inflicted by such animal without proof of negligence as to the manner in which the animal was kept."

"It therefore appears to be a *national responsibility*."

Congressman PRALL, (N. Y.) 69 Cong. Rec., Part 6, p. 6729.

"If flood control is a *national obligation*, as it undoubtedly is and is conceded by everyone, the obligation should be borne by the *Government* irrespective of locality and of a possible local benefit."

Congressman SPEARING, (La.) 69 Cong. Rec., Part 7, pp. 7027-7028.

"I am in favor of this flood control, and I expect to vote for it. It is a *national problem* and we should treat it as a *national problem*."

Congressman GREEN, (Fla.) 69 Cong. Rec., Part 7, p. 7121.

"Rivers and harbors, interstate and foreign commerce, and United States mails are all matters of *Federal responsibility*. The Mississippi and its tributaries is a great inland transportation system which, if controlled and utilized, is an invaluable asset to commerce and in-

ternal development in time of peace and one of our very greatest elements of national defense in time of war. . . .

"Defense of life and property of the citizen is *the highest national obligation.*"

Congressman LOWREY, (La.) 69 Cong. Rec., p. 7125.

"It is necessary to look upon this emergency as a *national disaster*. It has been so treated from its inception."

Congressman HERSEY, 69 Cong. Rec., Part 7, p. 7126.

" . . . the destruction wrought last spring upon the citizens of the Mississippi Valley was ghastly and horrible.

"In addition to the great destruction, interstate commerce was interfered with and our mail suspended and, all of these items taken into consideration, it has become a *national problem*. To a certain extent it is an international question. *It is the greatest producing region in the world*, and every factor which goes to make up the prosperity of the world is seriously affected."

Congressman CARTWRIGHT, (Okla.) 69 Cong. Rec., Part 7, p. 7127.

"Its nature makes it essentially a *national problem*. There is only one Mississippi River in the world."

Congressman REED, (Ark.) 69 Cong. Rec., Part 7, p. 7130.

"I believe the control of the Mississippi River is a *national problem* and that the cost thereof should be paid by the United States."

Senator ASHURST, (Ariz.) 69 Cong. Rec., Part 5, p. 5481.

"Everybody knows that *the Mississippi River drains about two-thirds of the territory of the United States.* From the summit of the Rockies on the west, and from the summit of the Alleghenies on the east, the waters of the rains that fall and the snows that melt find their way to that great drainage channel known as the Mississippi River."

Senator JONES, (Wash.) 69 Cong. Rec., Part 5, p. 5483.

"\* \* \* the American people realize the national character of the problem and *the duty of the Nation to pay its entire cost.*"

Senator RANDELL, (La.) 69 Cong. Rec., Part 5, p. 5492.

"\* \* \* this is a *great national problem*; that in the interest of *commerce*, in the interest of *navigation*, in the interest of *business* generally, in the interest of *national defense*, the *mail service*, and for other reasons, it is without question a *national problem.*"

Senator STEPHENS, (Miss.) 69 Cong. Rec., Part 5, p. 5493.

"This Government has no right to lay the hand of special taxation upon the flood-afflicted people of the Mississippi Valley and add to their already heavy burden by collecting taxes from them to aid this great Government in doing its simple duty toward solving a *purely national problem.*"

Senator HEFLIN, (Ala.) 69 Cong. Rec., Part 5, p. 5493.

"\* \* \* this question (Mississippi River flood control) is distinctly a *national question* in every sense of the word."

Senator MAYFIELD, 69 Cong. Rec., Part 5, p. 5294.

"\* \* \* the sentiment of the country had crystallized upon the proposition that it was the duty of the *Nation* to take charge of this great system of waterways, and to safeguard it for all time to come from the possibility of such a disaster as took place in 1927."

Senator SIMMONS, (N. C.) 69 Cong. Rec., Part 5, p. 5297.

"It is universally conceded that the problem is of national importance and that it must be *constructed* by the Government without delay. \* \* \* Hearings were begun by the House committee on November 7, 1927, and over 300 witnesses were heard during the ensuing three months. Their testimony was strangely cumulative, for, as shown by the record, nearly all declared with unanimity that this is a *national problem* and should be built of *national expense*."

"*It is a national problem.*"

Congressman FREAR, (Wis.) 69 Cong. Rec., Part 6, pp. 5869, 6655.

"There should be *one responsibility* as the report of the House committee suggests, and I have always contended that *the responsibility rests with the Government*."

Congressman COCHRAN, (Mo.) 69 Cong. Rec., Part 6, p. 5998.

"The problem of flood control is clearly national, not local. *It is the Nation's job.*"

Congressman ASWELL, (La.) 69 Cong. Rec., Part 6, p. 6111.

"Whatever adequate flood control shall cost the safety, peace, and prosperity of the Nation demands it. It is a *national necessity*, and like the Panama Canal we must

meet the emergency and do it. . . . everyone admits that flood control on the Mississippi is a *national problem*."

Congressman HOWARD, (Okla.) 69 Cong. Rec., Part 6, p. 6311.

" . . . the control of the flood waters of the Mississippi River in its alluvial valley is a *national problem*—the greatest internal project in America—and should be undertaken by the *National Government*. . . .

"*Abraham Lincoln* said: 'The driving of a pirate from the track of commerce in the broad ocean and the removing of a snag from its more narrow path in the Mississippi can not, I think, be distinguished in principle. Each is done to save life and property and to use the waterways for the purpose of promoting commerce. *The most general object I can think of would be the improvement of the Mississippi River and its tributaries.*'"

Congressman WILSON, (La.) 69 Cong. Rec., Part 6, p. 6644.

"The harnessing of the flood waters of the Mississippi is conceded to be our greatest domestic problem. . . . American public opinion is unanimous. Harnessing and curbing the Mississippi River is the *responsibility of the Nation*."

Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 6, pp. 6649-6650.

"The Mississippi is the world's greatest and most useful river." . . .

"In Louisiana not a drop of water enters the Mississippi River from where the Red River enters the Mississippi to the Gulf of Mexico, a distance of 300 miles. All the rainfall in Louisiana, Arkansas, and Mississippi



could have been carried safely to the Gulf for a small part of the money these States have spent in levee construction, but the floods from the Rockies, the Alleghenies, and the Great Lakes have swept down periodically, have swollen the current, broken the levees, and carried death and destruction in their wake. The States of the lower valley have already spent more than enough money to protect themselves from floods that originate in their territory. . . .

"The leading statesmen and the conspicuous business leaders and organizations of the Nation have said that flood control is a *national problem*, and that it is an injustice for the States of the lower valley to combat the flood waters of almost half the continent."

*"Flood control is a national problem."*

Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 4, pp. 4134, 4141, 4138.

"National responsibility for the control of the Mississippi is not a new idea, born of the tragedy of 1927. It dates back to the very first days of this Republic. *Washington* and *Jefferson*, by word and action, made it plain that this greatest river of our continent was for the *Nation* to use and to control. The early statesmen of this Republic emphasized this responsibility of the Government for the river.

" 'If the system be not national,' said *Henry Clay* once in the United States Senate, 'I should like to know one that is national.'

"*President Lincoln* said: 'The most general object I can think of would be the improvement of the Mississippi River. The statesmanship of America must grapple with the problem of this mighty stream.'

"Said *President Garfield*: 'It is too vast for any State to handle; too much for any authority other than that of the Nation itself to manage.'

"*President Roosevelt*, after a visit to the valley, said: 'We must build the levees and build them stronger and more scientifically than ever before.'

Congressman WILSON, (Miss.) 69 Cong. Rec., Part 3, p. 3465.

"\* \* \* flood control in the Mississippi Valley is national in scope and \* \* \* it is a problem of *Federal responsibility*.

"The Secretary of Agriculture in his annual report states that it is his conviction that—'Prevention of future disastrous floods is *an imperative national problem*.'"

"General Jadwin in his report says: 'The control of the Mississippi River has developed from a local problem to a *national problem*.' \* \* \*

"The Mississippi River and its tributaries are national assets, Government owned and Government controlled. Why should not the expenses be a Government responsibility?"

Congressman FULLBRIGHT, (Mo.) 69 Cong. Rec., Part 3, pp. 3400-3401.

"I concur in the repeated statement that this is a *national question*."

Congressman HASTINGS, (Okla.) 69 Cong. Rec., Part 7, p. 7012.

"Flood control on the Mississippi is *indeed a national problem*, and if this bill becomes the law, as I have every reason to believe it will, the *Federal Government* will meet and do its duty fully."

Senator McKELLAR, (Tenn.) 69 Cong. Rec., Part 5, p. 5495.

The foregoing statements clearly declare the composite mind of the Congress which enacted the Flood Control Act of May 15, 1928. Many additional quotations to the same effect could be taken from the congressional debates; but, suffice it to say, we find no record anywhere in the congressional debates suggesting that any member of Congress undertook to controvert any of the statements quoted. It is an indisputable fact that *national responsibility* was recognized and *accepted* by the United States, the present petitioner, by the passage of the Flood Control Act of May 15, 1928.

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## II. *Congress contemplated, and intended, LIABILITY.*

That the Congress, and the Congress alone, is authorized to speak for the petitioner United States, and shape its policies, is beyond question. When Congress deliberately assumes contractual liability on behalf of the Government no Court has the moral right to deny that liability.

Congress intended by the language of section 4 of the Flood Control Act to require payment by the United States of compensation for the servitude taken, viz., the "flowage rights." For this *right* to artificially overflow or flood their property—regardless of when, or how often used, if ever—the Government purposed, and expressly provided, that the property owners in the floodway should be paid. Congress desired to avoid any possible controversy as to whether or not such owners of property would be adequately protected by the provisions of the Fifth Amendment of the Constitution. Congress intended that "just compensation" for the "property" "taken" should be liberally construed to cover all *damages* sustained by the

property owners; notwithstanding, under former judicial decisions, the United States might not have been liable for such damages.

No informed mind can possibly doubt these facts after reading the official utterances quoted in the main brief (Point V, B, 2), and the following additional official excerpts.

1. Congressman WILSON, (La.) of the House Flood Control Committee, in explaining the intention of Congress, and the meaning of the Act, after quoting section 4, said:

"For the first time in history *the Federal Government assumes responsibility, at its own expense*, for the protection and security of the alluvial valley of the Mississippi River from destructive floods, \* \* \*.

"It was not the intention of the Senate or the House in the passage of the bill which was finally signed to subject the Government to any expenditures that were not fair or necessary in the execution of the project when finally adopted, and especially that phase of it dealing with diversions, spillways, and floodways. *The conclusion was reached that such diversions when planned, made, and executed by the Government should be entirely at national expense and national responsibility.* It was realized that when the Government undertook the control of the flood waters of the Mississippi River as a national function, under the Constitution, that it could and had the authority to construct and plan the works necessary to effect that purpose. The object and intention of section 4 is that *the Government shall provide the rights-of-way and construct the protective works where flood waters*

are to be diverted and shall provide *flowage rights* for additional destructive flood waters that will pass, *not normally, but by reason of diversions from the main channel of the river*. It is true that the word 'additional' negatives the idea that the Government would be called upon to pay for flowage rights over natural channels or over lands flooded in normal years.

"The contention has been made that certain sections of the valley are *natural floodways* and therefore should be used for the protection of other portions of the valley. *This is not true*. Natural channels are the only portions of the valley that could be termed natural floodways as distinguished from other portions. *Before levees were constructed the entire valley could have been termed a natural floodway* and in the flood of 1927, 18,000 square miles of the 30,000 square miles in the alluvial valley operated as a floodway. \* \* \* Destructive flood waters is that volume which passes out of the natural channel; *additional destructive flood waters is that volume which is deliberately diverted on the plans of the Government over a section of the valley not overflowed in normal years*. So it naturally follows as a matter of justice, clearly expressed by Congress, that *whatever rights-of-way and flowage rights are found necessary to carry out the purposes of the act shall be provided by the Government*." 69 Cong. Rec., Part 8, pp. 8210, 8211.

2. Mr. O'CONNOR of Louisiana. "*Why should not the Government bear the full cost of acquiring and operating spillways? If the engineers had recommended exclusively larger and stronger levees, I do not think the recommendations would be taken seriously by the House*. \* \* \*



"Without the *spillway site*, which, in my judgment, is *sine qua non* and *absolutely essential* in order to make for the success of the new plan, we might as well not legislate on the plan. Therefore the spillways, being a part of the whole system and being for the benefit of the whole river, should be considered a part of it and should not be looked upon merely as a local proposition, \* \* \*.

"Mr. TILSON. The gentleman means by spillways not only the site where it leaves the main river but *the entire land that would be covered by these overflows*? That is what the gentleman means by spillways?

"Mr. O'CONNOR of Louisiana. Yes; all of the land covered by these overflows through what is known as a spillway.

"Mr. TILSON. And the gentleman's idea is that *that should be paid for as a part of the expense*, the same as the levees?

"Mr. O'CONNOR of Louisiana. *I think so.*

"Mr. TILSON. Then to whom would this land belong?

"Mr. O'CONNOR of Louisiana. To the *National Government*. There should be *national responsibility in toto*. I do not think the States or local communities ought to have anything to do about it, because it is a national proposition.' 69 Cong. Rec., Part 1, p. 765.

3. "The bill authorizes an appropriation of \$325,000,000 and provides that *just compensation shall be paid by the United States for all property taken, damaged, or destroyed in carrying out the plan in the bill.*" Congressman SWANK, (Okla.) 69 Cong. Rec., Part 7, p. 7119.

4. "Mr. RAGON, (Ark.). With reference to the rights-of-way for these spillways and levees, is it the gentleman's thought that the local unit or the landowners should pay for them?

"Mr. WILLIAM E. HULL, (Ill.). *No, sir; I did not say that. It is just the opposite. You take Louisiana, which gets most of the floodways. I know that the people in that State have not the money with which to pay, so I think the State should make arrangements whereby the Government can purchase the floodways on the basis of tax valuation. In other words, they have got to make their laws so you can go through with the floodways, and then the Government furnishes the money to pay for them. Then, after a while, it may be possible to resell those lands. . . .*

"Mr. RAGON. Does the gentleman mean that the money would be given by the Government or advanced as a loan?

"Mr. WILLIAM E. HULL. It would be given outright by the Government. *The lands would be purchased by the Government, and if the lands were resold the money would go back into the Treasury of the United States.*"  
69 Cong. Rec., Part 2, p. 2263.

5. Before the final passage of the Act, the fight for local contribution was led by Congressman FREAR, (Wis.). Yet even he, speaking for the minority, readily conceded that *somebody* should pay for all damage done to property in the floodways.

"*Any additional damage caused by the Government should be paid, so far as the damage is concerned. The only criticism that rises in my mind is whether or not*

the Government should buy the flowage rights instead of permitting the damage to be recovered by court action." 69 Cong. Rec., Part 8, p. 8120.

"Next, as to this section 4, the proposition of damages. When it once goes in force you will have bills without limit presented to the United States, and you will have to try them by local juries just as you try the ownership of lands and their values. It is all to be done at Government expense." \* \* \*

"There is in the neighborhood of 4,000,000 acres to be given for this floodway. I believe it ought to be turned over to the States. I would be perfectly willing to loan money to the States to pay a portion of it, although I believe the States ought to assume it themselves." Congressman FREAR, (Wis.) 69 Cong. Rec., Part 6, p. 6779.

Congressman FREAR even read into the record a detailed list of the property owners who would be entitled to damages, with the acreage of each, and the total cost to the Government. (69 Cong. Rec., Part 6, pp. 5870-78.) There was no question whatever but that compensation was due these landowners from some source for their property which was dedicated as a public floodway by the Jadwin Plan for flood control.

"Mr. COX. The gentleman opposes the bill, for one among many reasons that it provides that the Government shall acquire rights-of-way. I would like to inquire of the gentleman if he favors the taking or damaging of private property for public use without compensation?"

"Mr. FREAR. *Why, no; certainly not.* I believe if this land is damaged beyond what it has been under the

original overflowing of these floodways, *the Government should pay for that damage, \* \* \** Congressman FREAR, 69 Cong. Rec., Part 7, p. 7000.

6. "Mr. LaGUARDIA. \* \* \* When the gentleman from Illinois (Mr. REID) points out that we should not permit land to be acquired without just compensation, he knows that neither the Federal Government nor a State Government can take the property of any citizen without due compensation.

"Mr. REID of Illinois. And the gentleman knows that property can be damaged by the Government without paying compensation. \* \* \* And that is what you intend to do here.

"Mr. LaGUARDIA. There is no one who contends that property should be taken without compensation. *There is no one who contends that property that is damaged by the work of the Government should not be paid for*, but we do object to going in and paying an excessive, exorbitant price for 3,700,000 acres of land now already in the hands of speculators or soon to get into their control." 69 Cong. Rec., Part 7, p. 7002. \* \* \*

7. "It is our boast that there is no wrong without a remedy. This is a vain boast unless the Federal Government does its whole duty to the people of the lower Mississippi Valley."

"I want to agree with my colleague from New York (Mr. O'CONNOR) that it is a sad commentary on this House if the United States Government cannot get justice in its own courts. If anybody will stand up and say you cannot get justice in your own courts, what kind of flim-flam have you been putting over on the people when

you have led the people to believe that the United States courts are integrity itself, that no one in any way could put anything over either on the judges or juries, and that *protection to the ordinary individual is their supreme guaranty*; and that if the Federal courts undertook to do a thing they would do it right. I have heard no scandals connected with our United States courts in any way, and I am surprised that any Congressman would even think of it." Congressman REID, (Ill.) 69 Cong. Rec., Part 6, pp. 6792, 6795.

8. "As expressed in the brief filed by Governor Martineau, of Arkansas, in referring to the Boeuf Basin floodway proposed by General Jadwin, which would flood over two and a half million acres, much of it productive land, and destroy many cities and towns in Arkansas in order to protect a portion of the State of Mississippi, Arkansas is being asked to '*pay a portion of its own funeral in order that other sections may survive.*'" Congressman REID, (Ill.) 69 Cong. Rec., Part 6, p. 6792.

9. "General Jadwin said he would turn the water down on those people and let them take their chances." Congressman REID, (Ill.) 69 Cong. Rec., Part 7, p. 7106.

"Under the Jadwin plan, if the river overflowed, you could go down here and take all of the property along Pennsylvania Avenue and say you have a right to do it because this was the natural floodway once, and that you have a right to put it in there again." Congressman REID, (Ill.) 69 Cong. Rec., Part 6, p. 6791.

"Such inequities and injustices in the Jadwin plan convince the committee that the legislatures of the valley States will never agree to it, and that, therefore, no flood-



control work will be done, \* \* \*” Congressman REID, (Ill.) 69 Cong. Rec., Part 5, p. 5613.

*“There is but one just and honorable way to handle this situation; that is, to pay these people for their lands, or acquire the flowage rights, and pay for the resulting damage to drainage system, highways, railroads, etc.”* Congressman REID, (Ill.) quoting from brief by Governor Martineau of Arkansas, 69 Cong. Rec., Part 5, p. 5649.

10. *“The flood problem has become a proposition to be dealt with as a national question and at national expense. Practically everyone is agreed upon this. \* \* \* If wider channels are needed, the land should be purchased.”* Congressman MORROW, (N. Mex.) 69 Cong. Rec., Part 5, p. 5321.

11. *“We also ought to have confidence enough in our own Federal courts to know that there will be no hold-up on the purchase of rights-of-way. The actual values should be paid to the owner, because it is unthinkable that we should take the land of one person in order to protect the property of another. \* \* \** It will not be a case comparable to juries rendering excessive damages against railroad companies, because in the first place juries will not be used under this law but only appraisers appointed by the judge. The honor and integrity of the Federal judges cannot be impugned.” Congressman SWING, (Calif.) 69 Cong. Rec., Part 6, p. 6717.

12. *“I want to answer the argument that the gentleman from New York (Mr. LaGUARDIA) has just made. It is a repetition of an argument made by other Members*

was no great Federal project for a comprehensive flood control," \* \* \*

"We all understand from the White House to this House, and everywhere else, that this is a national project, and we must treat it as such; \* \* \*" Congressman BLACK, (N. Y.) 69 Cong. Rec., Part 7, p. 7111.

In opposing this Amendment, Chairman REID, (Ill.) said:

"Mr. Chairman, the intent may be all right in this amendment, but the way it is worded and the place at which it is to be put into the bill will destroy all of the safeguards the distinguished leaders on this side of the House have tried to keep in the bill. Under the law at the present time, of course, benefits are to be considered. Under this amendment you would have to consider benefits before the improvement was thought of. Consequently benefits would not be taken into consideration. Of course, you could not violate the Constitution and the law and prohibit anybody from being an assignee to any rights, and prevent any payment to that person. It is inconsistent with my idea of ordinary law." 69 Cong. Rec., Part 7, p. 7111.

*Congress rejected this Amendment*, as it did all other amendments seeking to hamper or limit the right of the property owners in these floodways to collect from the Government just damages and compensation. 69 Cong. Rec., Part 7, pp. 7112-7113.

15. "This fear expressed here today that the Federal Government is not able to take care of itself in condemnation proceedings strikes me as something that never should fall from the lips of a lawyer. This indictment of the people of the South, that their local juries in the South are not

composed of patriotic citizens of this country, should be stricken from the RECORD. The assertion that the local juries of the South will mulct the Federal Government in condemnation proceedings and would make awards higher than in the case of proceedings started by the State or local communities is a false slander upon the great patriotic people of the South." Congressman O'CONNOR, (N. Y.) 69 Cong. Rec., Part 6, p. 6782.

16. "Mr. JOHNSON of Texas. And does not the bill also provide that instead of having juries to assess the damages the Federal court shall appoint three commissioners, who shall determine the values, and that their judgment shall be final?

"Mr. DRIVER. Yes; and I want to say to you that I will support any amendment that may be offered to this bill that will provide the machinery to insure a fair measure of value for these lands." 69 Cong. Rec., Part 6, p. 6783.

17. "One illustration will suffice to present the general influence. The Southeast Arkansas Levee District comprises 727,264 acres, of which 290,905 acres are in a state of cultivation. *The Jadwin plan proposes to dedicate 225,000 acres of the lands of such district to the Boeuf River floodway.* This land is now charged with levee and drainage liens equal in acreage to the other lands of the district. It comprises slightly more than one-third of the area of the district. Even though the amount of the present liens be relieved against through the purchase of the same for floodway purposes, the annual revenues of the district in the future will be diminished to the extent of more than one-third and leave to the district through such lessened revenues an inadequate sum to pay the expenses connected

of the House during this debate. The argument is, if this bill passes with a provision that the Federal Government shall acquire an interest in lands necessary for rights-of-way, it will have to take it at a valuation based upon an anticipated public improvement.

"I want to say, and particularly for the benefit of the gentleman who has just addressed the House, and who knows the law, that the Supreme Court of the United States in the case of the *United States v. The Chandler-Dunbar Co.*, (229 U. S. 55), made this holding:

"'One whose property is taken by the Government for improvement of navigation of the river on which it borders is not entitled to the probable advanced value by reason of the contemplated improvement. *The value is to be fixed as of the date of the proceedings.*'" Congressman COX, (Ga.) 69 Cong. Rec., Part 7, p. 7021.

### 13. The LaGUARDIA Amendment.

Congressman LaGUARDIA (N. Y.) took the position that the damage done to property in the floodways should be paid for by the lands which were protected by the flood control project. He said:

"I shall suggest at the proper time a plan whereby the 18,000,000 acres in the area of the benefit in the various States could pay for the 3,000,000 acres necessary for floodways and spillways in accordance with the plan in the bill. Let each State affected contribute *the amount necessary to pay for the spillways and floodways* in proportion to the acreage within the State directly benefited." 69 Cong. Rec., Part 6, p. 6724.

Congressman LaGUARDIA did introduce such an Amendment, but it was *rejected* by the Congress. 69 Cong. Rec., Part 7, p. 7030.

#### 14. The BLACK Amendment.

Congressman BLACK, (N. Y.) offered an amendment to provide:

"But in no case shall the damages exceed the market value of such property as of the date of this act, and as if the United States were not to undertake any comprehensive plan of flood relief. No awards shall be paid to any person taking title to affected property after the passage of this act, except through a judgment of a court of competent jurisdiction nor to assignees of anticipated awards. The Secretary of War shall employ such experts and engineers as to him may seem necessary in the conduct of such condemnation proceedings and benefit proceedings as are provided by this act." 69 Cong. Rec., Part 7, p. 7111.

In support of this amendment, Congressman BLACK urged:

"By this amendment I fix a rule of evidence. I say that the value of the property taken shall be the market value as of the date of the passage of this act, and, further to guard against high speculative damages, I say that when the property is taken its value must be considered as if the Government never thought of putting through any comprehensive flood-relief plan. Lawyers who know anything about condemnation work understand that in measuring the value of property you can take into contemplation any potential utilization of that property. I want this amended so that a man whose property is taken by this plan cannot say to the court that if the plan was shifted his property would be three times as valuable. That is the reason I want it understood that the property shall be taken as if there



with the operation of the agency." Congressman DRIVER, (Ark.) 69 Cong. Rec., Part 6, p. 6786.

18. "Under the Constitution as provided in the Fifth Amendment thereto, private property can not be taken for public use without just compensation. That phrase fixes the damages to which everybody is entitled in condemnation proceedings when property is taken for public use by the United States Government. \* \* \*

"The retention of section 4 as it now reads will mean a vast amount of litigation and ultimately great loss to the Government. \* \* \* *Everybody is entitled to just damages*, and the courts of the country have interpreted that phrase many times and have laid down rules for ascertaining just damages.

"*All of the language in section 4 of the bill enlarging the rule of damages fixed by the Constitution of the United States should be stricken out.*

"The railroads are entitled to their rights. Nobody would take any away—nobody could take them away. They are fixed by the Constitution of the United States." Congressman KOPP, (Iowa) 69 Cong. Rec., Part 6, p. 6712.

19. "The major portion of these lands where floodways are to be placed are not particularly valuable lands and the prices should be reasonable. *It should not be the policy of the Government to confiscate a man's property by running water over it without reimbursing the landholder*, but, on the other hand, the landholder should not be paid in excess of the true valuation of the property, \* \* \*." Congressman FULL, (Ill.) 69 Cong. Rec., Part 6, p. 6718.

20. "For myself I am perfectly willing, although everybody on this side may not agree with me, that *the*

*Government should pay for the flowage rights in the floodways."* Congressman MADDEN, (Ill.) 69 Cong. Rec., Part 7, p. 7003.

21. "Mr. MADDEN: Mr. Speaker and gentlemen, yesterday afternoon I introduced an amendment to the flood control bill which provided that when southern Illinois and southeastern Missouri and New Orleans assumed the responsibility of relieving the Government of any damages by reason of the work of construction which the Government was about to enter upon, then the work would proceed under the bill which we are considering. The House rejected this amendment.

"Since then, I have talked with the President, who says *he will not insist upon the conditions laid down in the amendment* which I proposed to the committee, and therefore I want to state to the House, in all good conscience, I have no valid reason that I know of for voting against the bill, and I propose to vote for it." Congressman MADDEN, (Ill.) 69 Cong. Rec., Part 7, p. 7096.

22. "Is not all this discussion upon the basis that *the property owner shall be reimbursed for the actual damage that he sustained?* Is there any doubt that if an amendment is needed to the law to give that actual effect, that the Congress will be ready to send him to the courts to determine what the actual damage is that he has sustained?" Congressman DEMPSEY, (Ill.) 69 Cong. Rec., Part 7, p. 7108.

23. "The fatal objection to the Jadwin plan is that it recommends that the States and districts agree to hold and save the United States free from all damages resulting from the construction of the project, and particularly in the

building of the diversions. This is *an impossibility*." Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 6, p. 6652.

24. "It was a monumental error to close Cypress Creek. It was a natural outlet. It traverses the lowest ground for spilling the waters of the Mississippi River. *As a part of any flood-control scheme it should be reopened and just compensation made by the Government to the people who have improved lands as a result of Cypress Creek being closed.* \* \* \* All engineers agree that at least 600,000 cubic feet should be diverted through the Cypress Creek outlet \* \* \*. *The Government should bear the expense incident to the diversions.*" Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 4, p. 4139.

25. GOVERNOR JOHN E. MARTINEAU, late United States District Judge in Arkansas, in his written brief filed with the House Committee on Flood Control (Part 4, p. 2500), said:

"The Jadwin report takes the position that the lands within the spillway area are not damaged and should be paid no damage. This, we consider, is the major economic mistake of the Jadwin plan, as *unquestionably the owners of the lands will have to be paid for damages for flowage rights.*"

Testifying personally before the Senate Committee on Commerce on the same Flood Control Bill, Governor (later U. S. District Judge) Martineau, said:

"The Jadwin plan further assumes that the lands that fall within these flowage ways will not be damaged by reason of the peculiar method of constructing them. *There never was a greater mistake made than that.* Every man

who owns land in these flowage ways recognizes that when it is placed where it is constantly subjected to an overflow without any protection, that *its value at least for agricultural purposes is destroyed.*"

26. "I regard the enactment of the flood control act of 1928 as the most constructive piece of legislation written upon our statute books during my five years in Congress. It was a matter of great satisfaction to me that the Congress stood steadfast by *the main proposition*, namely, that flood control to be effective must be *nationalized in the fullest sense of the term*. While we yielded to the President on many details, I am glad that Congress stood by *its main contention*, that *the Federal Government assume the total cost* and that no local assessments be levied.

"I am happy that the President signed the bill, but I am satisfied in my own mind that if he had not done so the Congress would have overridden his veto, *so strong was the sentiment in this country and this Congress for flood control of an effective kind.*" Congressman JACOB-STEIN, (N. Y.) 69 Cong. Rec., Part 8, p. 8584.

"The intention of the lawmaker is the law." *Hawaii v. Mankichi, supra.*

### III. Not a Reclamation Project.

Petitioner's (defendant in District Court) requested Finding of Fact No. 19 seeks to have the court assert: "The proof shows that the Boeuf Basin has always been a flood-way" (R. 356). On this false premise petitioner's counsel base their plausible, but fallacious, argument that the United States is not liable to appellant merely because the Government *failed to reclaim* her property from the natural and ancient flood bed of the Mississippi River.

General Jadwin was a victim of the same sophistry. Witness his statements: "The land in question (Boeuf Floodway) was originally an overflow channel of the Mississippi, and it must be available for the use of the river in extreme flood" (Doc. 90, sec. 120), and "The lands in the floodway \* \* \* will retain the same measure of protection that they now have." (Doc. 90, sec. 119.)

Of course it is wholly immaterial in determining the legal issue of liability on the part of the Government for the alleged "taking" whether respondent's land is undeveloped, overflow, swamp land with only nominal value, or highly improved agricultural land in actual production worth \$500 an acre. That would go only to the measure of damages. But it is important for the court to know that respondent is *not* seeking to force the Government to *reclaim* her property from an unprotected flood area, like the lands between the levee lines of the river or the reservoir overflow lands in the backwater areas at the mouths of the tributaries (as the White and Arkansas) which have never been reclaimed for development, use and cultivation.

The reclamation of respondent's property began generations ago and was *completed* when the gap in the levee lines at the mouth of Cypress Creek was closed in the year 1921, six years before respondent bought her property.

Even General Jadwin, somewhat inconsistently, takes notice of this long since completed reclamation, reminding the Congress: "The values and population behind the levees are increasing all the time. It has been estimated that damages from the 1927 flood were over \$200,000,000." (Doc. 90, sec. 27). Again: "The loss of life and property in the recent great flood in the alluvial valley followed the break-



ing of the levees which reclaimed the land for the use of man. This *reclamation* had been pushed so far that insufficient room was left in the river for the passage of the unprecedented volume of flood water." (Doc. 90, sec. 6.)

The most conclusive refutation of this unfair, prejudicial, specious argument that respondent's property must be regarded as lying in the natural high-water bed of the river and therefore subject to the Government's use at pleasure without liability, is found in the decision of the Supreme Court of the United States to the contrary. See *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041, at p. 1049, hereinafter quoted by Congressman Cox.

*Congress also rejected this theory so inconsistent with the actual facts.*

1. "It has been stated that flood control is a *reclamation* matter; that it confers special benefits to special land-owners and should be paid for by them. No *one who has investigated the subject ever made such claim*. It is merely *an ignorant assumption unsupported by facts*."

Senator HAWES: 69 Cong. Rec., Part 4, p. 4396.

2. "The opposition have said in effect that this legislation will confer a great benefit upon the people who transgressed upon the natural flowage rights of the river; that the river was in existence when the people settled there; and that this is a reclamation project proposed to be carried on for the special benefit of the people who live near the river from its source to where it empties into the Gulf. . . .

"I should like in reply to this argument to quote from what I think is quite respectable authority, that is, from

a decision of the Supreme Court of the United States found in volume 241 of the Supreme Court Reports, page 368, a decision rendered by Mr. Chief Justice White, one of the most distinguished jurists ever occupying that high position:

“ ‘Indeed, from the face of the bill, it is apparent that the rights relied upon were assumed to exist upon the theory that the valley through which the river travels, in all its length and vast expanse, with its great population, its farms, its villages, its towns, its cities, its schools, its colleges, its universities, its manufactories, its network of railroads, some of them transcontinental, are virtually to be considered from a legal point of view as constituting *merely the high-water bed of the river*, and therefore, subject, without any power to protect, to be submitted to the destruction resulting from the overflow by the river of its natural banks. \* \* \*

“ ‘In fact, the nature of the assumption upon which the argument rests is shown by the contention that the building of the levees under the circumstances disclosed was a work not of preservation but of *reclamation*—that is, a work not to keep the water within the bed of the river for the purpose of preventing destruction to the valley lying beyond its bed and banks, but to *reclaim* all the vast area of the valley from the peril to which it was subjected by being situated in *the high-water bed of the river*. If it were necessary to say anything more to demonstrate the *unsoundness of this view*, it would suffice to point out that the *assumption is wholly irreconcilable with the settlement and development of the valley of the river*; that it is at war with the action of all the State Governments having authority over the territory, and is a complete denial of the legisla-

tive reasons which necessarily were involved in the action of Congress creating the Mississippi River Commission and appropriating millions of dollars to improve the river by building levees along the banks in order to confine the waters of the river *within its natural banks*, and by increasing the volume of water to improve the navigable capacity of the river'."

(*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041, at p. 1047.) Congressman COX, (Ga.) 69 Cong. Rec., part 6, p. 6720.

3. "The Committee on Flood Control, to which was referred the bill to prevent destructive floods which cause the loss of life and property, interrupt interstate commerce or delay the United States mails; and to prevent the recurrence of a flood such as that of the Mississippi River in 1927, which resulted in the loss of more than 246 lives, drowned out hundreds of cities, towns, and villages, drove 700,000 people from their homes, rendering them objects of charity dependent upon the Red Cross and other agencies, inundated 18,000 square miles, destroyed 1,500,000 farm animals, caused losses amounting to many hundreds of millions of dollars, suspended interstate freight and passenger traffic, prevented telegraph and telephone communication, delayed the United States mails, and paralyzed industry and commerce, having considered, the same, report thereon with a recommendation that it do pass, \* \* \*."

Chairman REID, 69 Cong. Rec., part 5, p. 5616.

4. "There is no connection between this project of flood control and a reclamation project. \* \* \*

"The assumption that the project should be paid for in the same manner as reclamation projects can not be

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sustained upon the facts. A reclamation project has for its object the reclaiming or bringing into existence lands theretofore not susceptible of cultivation, while the lands herein involved have been in cultivation for hundreds of years. This is not reclamation but *preservation*. \* \* \*

"This is *not a reclamation project* but is a humanitarian one, pure and simple, and the United States should *not attempt to drive a hard bargain when the safety and welfare of so many of its citizens are at stake*. Shall it, like Shylock of old, demand its pound of flesh for its ounce of gold, *especially when this work is made necessary to correct the mistaken policy of the Government itself in the control of the Mississippi River?*"

Congressman REID, (Ill.) 69 Cong. Rec., part 6, pp. 6790-6792.

5. "Flood control on the Mississippi is *not reclamation but protection* of vast areas of improved lands on which are located many towns and cities, including New Orleans, the metropolis of the south, inhabited by fully 1,500,000 people. These valley dwellers are good citizens who contribute more than their pro rata share to the Nation's wealth, and are progressive, energetic, law-abiding people, real nation builders, entitled to every consideration at the hands of their national father."

Senator RANDELL, (La.) 69 Cong. Rec., part 1, p. 938.

6. "When President Coolidge, in his message to Congress, took the position that because the land of the Mississippi Valley would be benefited by protection from floods, it must therefore bear a special assessment to pay for *such reclamation*, he revealed the fact that in spite of his unmatched opportunity for reviewing the situation as a whole



and studying it in a broad and comprehensive fashion, he is nevertheless peeping at it through a knothole. His thoughtless use of the word '*reclamation*' alone reveals a woeful failure to grasp the essentials of the problem, a failure that could hardly have persisted had he once visited the flooded area. \* \* \*

"To think of reclamation is to think of barren lands or swamps that may some day be made productive. That section which Mr. Coolidge speaks of is already producing farm and factory products worth half a billion dollars annually. *Such a section does not need reclamation.* It needs protection."

Editorial, Baltimore Manufacturers Record, put into the record by Senator RANSDELL, 69 Cong. Rec., Part 1, p. 774.

7. "With all deference to the opinion of the President of the United States, there is, to my mind, a great difference and distinction between reclamation and levees. Reclamation creates, while levees retain and protect. \* \* \*

"Levees do not reclaim lands. \* \* \* They made it possible for the development of farm lands which, in 1926, produced over \$250,000,000 of farm products. They made it possible for populous cities and thriving towns and busy factories to be found all over the Mississippi Valley."

Congressman COLLIER, (Miss.) 69 Cong. Rec., Part 2, p. 1729.

8. "I regret very much that the present President, Mr. Coolidge, did not find it in his heart to come down and see the conditions which existed a year ago in the valley. It was worth anybody's time and it seems to me that it imposed an obligation upon the Chief Executive to acquaint himself with those conditions. In my own State of Arkansas we had 16,000 square miles of territory under

water. Thousands of people were stranded in the flood where they had to be brought out by any means of transportation that could be secured. I am sure the Senator from Louisiana (Mr. RANSELL) witnessed that some of them were brought out who had been marooned in treetops, on house-tops, on railroad embankments, and other places where they could escape the flood, so long that they had become almost wild. I saw them bring out people down in *the southeast part of my State* where they had to prevent them jumping off the boat into the water as they approached land. They came out with the scantiest of wearing apparel. Everything that they had was gone. Everything that breathed in that territory, except those human beings, had been drowned. Their livestock was gone; even their chickens were gone. Their household effects were gone. While they might not have had much, it was all they had.

“There were stretches of country miles in width and miles in length in which there was not a single thing left that man had put there. Every house, every barn, every outbuilding of every nature, even the fences, were swept away... It was as desolate as this earth was when the flood subsided. So far as their little effects were concerned, it was just as destructive. Where *nearly a million people* who had paid their taxes, who had discharged every obligation to the Government that the Government imposed upon them, who had shed their blood on every battle field where American honor was at stake, I felt then and I feel now that they were and are entitled to a consideration which they did not get.”

Senator CARAWAY, (Ark.) 69. Cong. Rec., Part 8, pp. 8190-8191.

9. “It has been suggested that the works for the flood control of the Mississippi would *reclaim* the lands in the

alluvial valley. *There is no similarity between flood control and reclamation.* The very opposite obtains. The dissimilarity suggests a contrast rather than a comparison. The lands in the lower Mississippi Valley are not wild. They are improved. The area is highly developed. It is said that no lands have been cleared in the Atchafalaya Basin for 100 years. This is no reclamation scheme. *Reclamation is already an accomplished fact in the Mississippi Valley.* Practically all of the lands have been cleared and can be cultivated with profit."

Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 6, p. 6652.

10. Even a casual examination of the itemized statement of losses and damage caused by the flood of 1927, as prepared by the Mississippi River Flood Control Association, presented to Congress (69 Cong. Rec., Part 4, p. 4397), demonstrates that the prime purpose of the Flood Control Act of May 15, 1928, was *not reclamation*, but was for the *protection* of an intensely developed agricultural area, in which damages from the 1927 flood caused enormous losses to the Nation. Respondent's property involved in this suit lies in Desha County, of which Arkansas City, the front door of respondent's property, is the county seat. In that county alone the damages in 1927 caused by crevasses in the *Arkansas River* (not the Mississippi—R. 163) levees exceeded \$9,000,000, listed in the Congressional Record as follows:

"DESHA COUNTY

"3,000 houses destroyed .....	\$1,500,000
3,000 houses damaged .....	900,000
35 stores destroyed .....	26,250
165 stores damaged .....	82,500

5 gins damaged	5,000
5 gins destroyed	50,000
500 barns destroyed	300,000
500 barns damaged	150,000
6,000 other buildings destroyed	600,000
Damage to merchandise	75,000
Damage to baled cotton	175,000
Damage to farm implements	20,000
Damage to automobiles	45,000
Damage to feed	125,000
Damage to seed	50,000
Damage to household goods	1,800,000
3,000 horses and mules lost	300,000
2,800 cattle lost	56,000
3,500 hogs lost	35,000
350 sheep and goats lost	1,050
10,000 poultry lost	5,000
Cost of replanting	100,000
Damage to land by washing and spreading of obnoxious grasses	375,000
Loss of rents on lands not cultivated by reason of overflow	500,000
Damage to 100 miles of fence	15,000
Business losses	1,000,000
Damage to growing cotton crops	500,000
Damage to other growing crops	150,000
Damage to private roads and bridges	50,000
Damage to matured crops	20,000
Damage to school buildings and equipment	15,000
<b>Total property damage</b>	<b>\$9,025,800'</b>

Therefore the court will not likely be misled by the unfair argument that recovery must be denied respondent because forsooth her property was in times long since past the ancient and natural flood bed of the river.

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## APPENDIX C.

**WHAT IS "PROPERTY"?**

"Property, in its broadest sense, is *not the physical thing*, which may be the subject of ownership, but is the right of dominion, possession, power and disposition, which may be acquired over it; the word meaning, in its appropriate sense, that dominion, or indefinite right of use or disposition, which one may lawfully exercise over particular things or subjects, and generally *to the exclusion of all others*, and doubtless this is substantially the sense in which it is used in the Constitution.

"The right to possess, use, occupy and enjoy corporeal things and take the profits thereof is what the law regards as corporeal property."

*Transcontinental Oil Co. v. Emmerson*, 298 Ill. 394, 401, 131 N. E. 645, 16 A. L. R. 507.

"Property in a legal sense consists in the *domination* which is rightfully and lawfully obtained *over a material thing*, with the right of use, enjoyment and disposition. In the full sense, it denotes a right in point of user, *unrestricted* in point of disposition and *unlimited* in point of duration over a determinate thing."

*Shedd v. Patterson*, 312 Ill. 371, at p. 374, 144 N. E. 5.

"It (property) is *not the material object*, but the right and interest which one has in it, *to the exclusion of others*, which constitutes property. Property, in a legal sense, consists in the domination which is rightfully and lawfully obtained over a material thing, with the right to its use, enjoyment, and disposition.

"The word is often used to indicate the subject of the property or the things owned, as a chattel or a tract

of land. These things, however, though subjects of property, are, when coupled with possession, but *the visible manifestations of invisible rights*, the evidence of things not seen."

*Tatum Bros., etc., Co. v. Watson*, 92 Fla. 278, 289, 109 So. 623, 626.

"Property, in the constitutional sense, consists not in the thing said to be owned, but in the right of dominion over it, control of its use and disposition. The thing owned may be tangible or intangible, a fee in land or an *easement in it*."

*C. B. & Q. R. Co. v. Public Utilities Com.*, 69 Col. 275, 279, 193 Pac. 726, 728.

"Property means one's *exclusive* right of possessing, enjoying and disposing of a thing."

*In re Crook*, 219 Fed. 979, 985.

"Property may therefore justly be defined as the dominion, or indefinite right of user or disposition, which one may exercise over particular things or subjects. This is its appropriate *meaning, and that which it has in the Constitution*, although it is not infrequently used to indicate the thing, rather than the right, and *much of the uncertainty and confusion observable in the decisions have arisen from overlooking this distinction*."

*Watson v. Wolf*, 162 Pa. ~~153~~, at p. 169, 29 Atl. 646, 652.

"Of what does property practically consist, but of the incidents which the law has recognized as attached to the title, or right of property? Is not the idea of property in, or title to lands, apart from, and stripped of all its incidents, a purely *metaphysical abstraction*, as immaterial and useless to the owner as 'the stuff that

dreams are made of?' Is it not a much less injury to him, if it can injure him at all, to deprive him of this abstraction, than of the incidents of property, which alone render it practically valuable to him? And among the *incidents of property* in land, or anything else, is not the right to enjoy its beneficial use, and so far to *control* it as to *exclude others from that use*, the *most* beneficial, the one most real and practicable idea of property, of which it is a much greater wrong to deprive a man, than of the mere abstract idea of property without incidents? This use, or the right to control it with reference to its use, constitutes, in fact, all that is beneficial in ownership except the right to dispose of it; and this latter right or incident would be rendered barren and worthless stripped of the right to the use. Property does not consist merely of the right to the ultimate particles of matter of which it may be composed, of which we know nothing, but of those properties of matter which can be rendered manifest to our senses, and made to contribute to our wants or our enjoyments."

*Grand Rapids Booming Company v. Jarvis*, 30 Mich. 308, at pp. 320-321.

"The owners of lots abutting upon a public street have the right to access and the right of quiet enjoyment and *such rights are property* \* \* \*; that is, they have an interest in the street not common to all the people of the State, but personal and peculiar to themselves. *Their property is affected in its commercial value* and in the possibility and advantages of its use by the character of the streets upon which it abuts. \* \* \* Even partially sentimental objections, such as noise of electric cars or the

unsightliness of elevated structures, largely make up *the actual elements of market value.*"

*Holst v. Savannah Elec. Co.*, 131 Fed. 931, 942-943.

"The term 'property' as used in the Constitution is not confined to tangible objects which can be passed from hand to hand, but includes those rights of possession, disposal, management, and of contracting with reference thereto, which renders property useful, valuable and a source of happiness, the right to the pursuit of which is preserved. (Cases cited.)"

*State v. Kreutzberg*, 114 Wis. 530, 534, 90 N. W. 1098, 1100.

"In declaring that private property shall not be taken without recompense, that instrument secures to owners, *not only possession of property, but all those rights which render possession valuable. Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property.* In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense."

*Pennsylvania R. R. Co. v. Angel*, 41 N. J. E. 316, 329, 7 Atl. 432.

"Property is a thing over which a man may have *dominion and power to do with it as he pleases, as long as he does not violate the law.*"

*Smith v. Campbell*, 10 N. C. 590, 597.

"There may be a 'taking' of property *without an actual physical invasion of the property.*"

*City of Big Rapids v. Big Rapids Co.*, (Mich.), 177 N. W. 284.

"The term 'property' has a most extensive signification, and in its strict legal sense means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects. But the word is often used to indicate the subject of the property or the thing owned, as a chattel or a tract of land. *These things, however, though the subjects of property, are, when coupled with possession, but the indicia, the visible manifestations, of invisible rights, the evidence of things not seen.* Much of the uncertainty and confusion observable in the decisions have arisen from overlooking this distinction, \* \* \*.

"The term may mean the sum total of man's wealth, but when an injury to property is spoken of *a diminution of the value of a specific object is meant.*" \* \* \*

"Property in a determinate object as heretofore defined is composed of certain constituent elements, to-wit, the *unrestricted* right of use, enjoyment, and disposal of that object. Indeed the right of user is the most essential and beneficial quality or attribute of property. Without it all other elements which go to make up property would be of no effect. If one is deprived of the use of his property it leaves in his hands nothing but a barren title. \* \* \* *This right of user necessarily includes the right and power of excluding others from using the object.* Property in a given thing may be absolute or it may be limited and qualified. It is absolute when a thing is objectively and lawfully appropriated by one to his own



use in exclusion of all others, and which he can by no contingency be deprived of without his consent. It is limited or qualified when the control acquired falls short of the absolute."

22 R. C. L., pp. 37-39, secs. 2 and 3; with numerous cases cited in footnotes.

"The term 'property' is, in law, a generic term of extensive application. It is a term of large import, of broad and exceedingly complex meaning, of the broadest and most extensive signification, a very comprehensive word, and is the *most comprehensive of all terms which can be used*. The term is often called 'nomen generalissimum,' and is employed to signify *any valuable right* or interest protected by law, \* \* \* Although it has been stated that 'the accurate delimitation of the concept property would afford a theme especially apposite of amplificative philosophic disquisition,' (*Gleason v. Thaw*, 236 U. S. 558, 35 S. Ct. 287, 59 L. ed. 717, 719) there is also authority that dictionaries, as well as courts, have given the term 'property' a well established and definite meaning. *Property is a creation of law, an institution of law, and in all its forms is a creature of the law.*"

50 C. J., p. 729, sec. 2; and numerous cases cited in the notes.

"'Private property' is that which belongs exclusively to an individual; it is a *monopoly in nature and purpose*. The term applies to all kinds of private property; it necessarily includes everything that can be held or owned by private persons, and it is *not limited to a tangible subject-matter or corpus*, but includes the right of user and enjoyment thereof. In fact it has been stated that

'by private property is meant the right of absolute control of property,' and the term includes the right of contract in matters concerning that property."

50 C. J., p. 745, sec. 17.

It is therefore perfectly clear that counsel for petitioner are discussing issues entirely beside the point when they urge that there has not yet been any "physical invasion," and respondent has not yet been actually drowned by flood waters from the Mississippi River diverted by the Flood Control Act over her land in the Boeuf Basin floodway. They ignore the vital fact that the very fixing and dedication of this floodway by the Government under the terms of the Flood Control Act has invaded certain constituent elements of the respondent's *property*, viz, her UNRESTRICTED right of use, enjoyment and disposal, *to the exclusion of petitioner* and everyone else. Anything which destroys or subverts any of the essential elements of property hereinbefore mentioned is a "TAKING," or destruction *pro tanto* of respondent's *property*, though the possession and power of disposal of the land (at its diminished value) remain undisturbed, and "*though there be no actual or physical invasion of the locus in quo.*"

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## APPENDIX D.

**What constitutes "a TAKING" for which just compensation is required by the Fifth Amendment?**

The historical evolution and development of the legal concept of what constitutes "*a taking*" of property in the constitutional sense will not be fully appreciated, and possibly will not be correctly applied to the facts in the present case, until the *principles* reviewed in the judicial decisions have been studied chronologically, as has been suggested in the main brief, Point V, B, 4, c. No prior decision has ever involved *facts* equiparant to those now before the court, unless it be the case of *Hurley v. Kincaid, infra*. No decision prior to the Flood Control Act of May 15, 1928, can determine this case. That Act changed former judicial rules by legislative edict, the authoritative decree *now* controlling this court.

However, in addition to the quotations found in the main brief on this point, the following excerpts from the cases cited do reflect legal principles applicable to the facts in the instant case, and upon which respondent relies.

In *Pumpelly v. Green Bay & Miss. River Canal Co.*, 13 Wall. 177, 20 L. ed. 557, we find a statement of the fundamental principles on which liability rests stated in the opinion as follows:

"The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a *consequential* result of such use of a navigable stream as the Government had a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public it can *destroy its value* entirely, can inflict irreparable and permanent injury to *any extent*, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and *make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.*" • • •

"In the case of *Gardner v. Newburgh*, 2 Johns, Ch. 162, Chancellor Kent granted an injunction to prevent the trustees of Newburgh from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the Act of the Legislature which authorized it, had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this though there was no provision in the Constitution of New York such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several continental jurists on this right of eminent

domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. And he adds that the principles and practice of the English Government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land, which was considered as taking private property for public use, but which, *under the argument of the defendant's counsel, would, like overflowing the land, be called only a consequential injury.*

"If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection to individual rights.

*"But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that UNDER THE CONSTITUTIONAL PROVISIONS IT IS NOT NECESSARY THAT THE LAND SHOULD BE ABSOLUTELY TAKEN."* (Cases cited.) *Pumpelly v. Green Bay & Miss. R. C. Co., supra.*

In *United States v. Great Falls Mfg. Co.*, 112 U. S. 645; 5 S. Ct. 306, 28 L. ed. 846, the opinion calls attention to the fact that in this case "the land and water rights and privileges in question have been for nearly twenty years held



and used by officers and agents of the Government, without any compensation whatever having been made therefor to the claimant." (Yet no plea of limitation seems to have been involved.) The court then holds:

*"We are of opinion that the United States, having by its agents, proceeding under the authority of an Act of Congress, taken the property of the claimant for public use, is under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken pursuant to an Act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims, of actions founded upon any contract, express or implied, with the Government of the United States." . . .*

"In the same case (*Langford v. U. S.*, 101 U. S. 341, 25 L. ed. 1010) it was said: 'We are not prepared to deny that when the Government of the United States, by such formal proceedings as are necessary to bind it, takes for public use, as for an arsenal, custom-house or fort, land to which it asserts no title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value. It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation. And we are not called on to decide that when the Government, acting by the forms which are sufficient

to bind it, recognizes the fact that it is taking private property for public use, the compensation may not be recovered in the Court of Claims. On this point we decide nothing.'

*"The question thus reserved from decision is substantially the one now presented. . . ."*

*"In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an Act of Congress, is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose. If the claimant makes no objection to the particular mode in which the property has been taken, but substantially waives it, by asserting, as is done in the petition in this case, that the Government took the property for the public uses designated, we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation."* *United States v. Great Falls Mfg. Co., supra.*

In *Great Falls Mfg. Co. v. Garland, Attorney General*, 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527, the general principle is stated:

*"The Government is under a constitutional obligation to make compensation for any property or right taken, used and held for the purposes indicated in such Act of Congress, whether it is embraced or described in said survey or map, or not."*

This is supported by the following quotations from the opinion:

*"But even if it be true that some part of the land actually occupied by the Government is not within the survey and map, still the United States are under an*

obligation imposed by the Constitution to make just compensation for all that has been in fact taken and is retained for the proposed dam." \* \* \* and, consequently, the Government is under a constitutional obligation to make compensation for any property or *property rights* taken, used, and held by him for the purposes indicated in the Act of Congress, whether it is embraced or described in said survey or map, or not,

"Even if the secretary's survey and map, and the publication of the Attorney General's notice, did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the Company to *wave the tort*, and *proceed against the United States, as upon an implied contract*, it appearing, as it does here, that the Government recognizes and retains the possession taken in its behalf for the public purposes indicated in the Act under which its officers have proceeded.

"\* \* \* *there is no obstacle in the way of the plaintiff's securing by means of its suit in the court of claims, and without unreasonable delay, just compensation for all of its property taken for the public use indicated in the Act of Congress.*" *Great Falls Mfg. Co. v. Garland, supra.*

In *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463, it is held that THE QUESTION OF COMPENSATION IS JUDICIAL. We quote the following from the opinion:

"Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the Government, is of importance; for in any society the

*fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the Government.* The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the Government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.

“In the case of *Sinnickson v. Johnson*, 17 N. J. L. 129, 145, cited in the case of *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. 166, 178 (20 L. ed. 557, 560), it was said that ‘this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that *the right to compensation is an incident to the exercise of that power*: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principles.’ And in *Gardner v. Newburgh*, 2 Johns, Ch. 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, *on the other hand*, it prevents the public from loading upon one individual more than his just share of the burdens of Government, and says that when he surrenders to the public something more and different from that which is exacted from other

*members of the public, a full and just equivalent shall be returned to him. . . .*

“And with respect to constitutional provisions of this nature it was well said by Mr. Justice Bradley, speaking for the court, in *Boyd v. United States*, 116 U. S. 616, 635 (29 L. ed. 746, 752): ‘Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that *constitutional provisions for the security of person and property should be liberally construed*. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. *It is the duty of the courts to be watchful for the constitutional rights of the citizen*, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. . . .’

“By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. *But this is a judicial, and not a legislative question*. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that *just compensation shall be paid*, and the ascertainment of that is a judicial inquiry. . . .

‘They, (the legislature) provide that the new company shall



pay annually to the college in behalf of the old one a hundred pounds. By this provision it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do: assess the amount of compensation to which the complainants are entitled.' See also the following authorities: *Com. v. Pittsburgh & C. R. Co.*, 58 Pa. 26, 50; *Pennsylvania R. Co. v. Baltimore & O. R. Co.*, 60 Md. 263; *Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300.

"In the last of these cases and on page 315, will be found these observations of the court: 'The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything can be clear and undeniable upon principles of natural justice or constitutional law, it seems that this must be so.' \* \* \*

"\* \* \* *The value of property generally speaking, is determined by its productiveness—the profits which its use brings to the owner. Various elements enter into this matter of value. Among them we may notice these: Natural richness of the soil as between two neighboring tracts—one may be fertile, and the other barren; the one so situated as to be susceptible of easy use, the other requiring much labor and large expense to make its fertility avail-*

able. *Neighborhood to the centers of business and population largely affects values.* For that property which is near the center of a large city may command high rent, while property of the same character, remote therefrom, is wanted by but few. \* \* \*

*"So before this property can be taken away from its owners the whole value must be paid. \* \* \**

*"But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th Amendment, we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. \* \* \* Whatever be the true value of that which it takes from the individual owner, must be paid to him before it can be said that just compensation for the property has been made. \* \* \**

*"\* \* \* It would seem strange that, if by asserting its rights to take the property, the Government could strip it largely of its value, destroying all that value which comes from the receipt of tolls. \* \* \**

*"\* \* \* and the question of just compensation is not determined by the value to the Government which takes, but the value to the individual from whom the property is*

taken." *Monongahela Navigation Co. v. United States, supra.*

*United States v. Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539, is often cited as the leading case on Government liability for property damaged or taken for public use. We quote the following syllabi:

"A circuit court of the United States has jurisdiction of a suit against the United States to recover compensation for the alleged total destruction of the value of real property as a necessary result of the acts of its officers and agents in improving navigation, where the Government does not deny plaintiff's title, and admits that the work done was authorized by Congress, but denies that such work produced the alleged injury and destruction.

"The liability of the United States under the 5th Amendment to the Federal Constitution, to make just compensation for an appropriation of land for public use, is not defeated because such land was taken by the Government in the exercise of its power to improve navigation."

The entire opinion rewards careful study. The following extracts might refer to the case at bar:

"It seems clear that these property rights have been held and used by the agents of the United States, under the sanction of legislative enactments by Congress; \* \* \* *The making of the improvements necessarily involves the taking of the property; \* \* \**

"\* \* \* we are of the opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. *The law will imply a promise to make the required compensation, where prop-*

erty, to which the Government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses.

"Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of *implied contract*, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the Government of the United States.' " \* \* \*

"Whenever in the exercise of its Governmental rights it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others. \* \* \*

"This brings the case directly within the scope of the decision in *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306, where, as here, there was no direction to take the particular property, but a *direction to do that which resulted in a taking*, and it was held that the owner might waive the right to insist on condemnation proceedings, and sue to recover the value. \* \* \*

"*Was there a taking?* There was no proceeding in condemnation instituted by the Government, no attempt in terms to take and appropriate the title. There was no adjudication that the fee had passed from the land owner to the Government, and if either of these be an essential element in the taking of lands, within the scope of the 5th Amendment, there was no taking. \* \* \*

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and se-

curity to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public, it can destroy its *value* entirely, *can inflict irreparable and permanent injury to any extent*; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." \* \* \*

"It is clear from these authorities that where the Government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th Amendment. While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested." \* \* \*

"But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the Government may appropriate property, it cannot do so without being liable to the obligation cast by the 5th Amendment of paying just compensation.



"But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this, 5th Amendment, and can take only on payment of just compensation."

"\* \* \* Here there is no finding, no suggestion, that by any expense the flooding could be averted." *United States v. Lynah, supra.*

So is it in the case at bar.

*Easements.* In *United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54 L. ed. 787, the court held:

"The owner of a farm, a part of which is permanently flooded by a Government dam, must be compensated, in addition to the value of the land taken, for the lessened value of the farm, caused by the consequent cutting off of a private way across the lands of others, which is the only practicable outlet from the farm to the county road." 54 L. ed. 787.

In *United States v. Grizzard*, 219 U. S. 180, 31 S. Ct. 162, 55 L. ed. 165, the court said:

"Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury

due to the use to which the part appropriated is to be devoted." 55 L. ed. at p. 166.

In the *United States v. North American Transp. & Trading Co.*, 253 U. S. 330, 40 S. Ct. 518, 64 L. ed. 935, the Court restates the now well established principle in the following sentence:

"When the Government, without instituting condemnation proceedings, appropriates for a public use, under legislative authority, private property to which it asserts no title, it impliedly promises to pay therefor (cases cited)." 64 L. ed. 937.

In *Campbell v. United States*, 266 U. S. 368, 45 S. Ct. 115, 69 L. ed. 328, the Court uses the following language which is applicable to the case at bar:

"The taking was under the sovereign power of eminent domain. The President and Secretary of War were authorized to purchase or condemn the lands. . . . And from the taking there arose an implied promise by the United States to compensate plaintiff for his loss. (Cases cited.) Thereupon he became entitled to have the just compensation safeguarded by the 5th Amendment to the Constitution; that is, *the value of the land taken and the damages inflicted by the taking*,—such a sum as would put him in as good a position pecuniarily as he would have been if his property had not been taken." 69 L. ed. 330.

In *Pennsylvania Coal Company v. Mahon*, 260 U. S. 393, 43 S. Ct. 158, 67 L. ed. 322, the Court held that a statute forbidding the mining of coal under private dwellings or streets or cities in places where the right to mine such coal is reserved in the grant is unconstitutional, as *taking prop-*

erty without due process of law. In the opinion the Court says:

"As said in a Pennsylvania case: 'For practical purposes, the right to coal consists in the right to mine it.' (Case cited.) What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. \* \* \*

"The general rule, at least, is that while property may be regulated to a certain extent, *if regulation goes too far it will be recognized as a taking*. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the *constitutional way of paying for the change*." 67 L. ed., pp. 325, 326.

In *Duckett & Company v. United States*, 266 U. S. 149, 45 S. Ct. 38, 69 L. ed. 216, the Supreme Court recognizes, and stated, the very practical fact, so distressingly real to respondent in the case at bar, that: "*A right may be taken by simple destruction for public use*." 69 L. ed. 219.

In *Curtin v. Benson*, 222 U. S. 78, 32 S. Ct. 31, 56 L. ed. 102, the court held that the Secretary of the Interior cannot make the exercise by an owner and lessee of lands within the Yosemite National Park, of his right to pasture his cattle upon such lands, and to use the toll roads leading thereto, conditional upon his compliance with certain rules and regulations prescribed by the Secretary for the Government of the park, as to marking and defining the boundaries, or obtaining the written permission of the superintendent. Because, as stated by the court in its opinion:

“On the merits of the case we may concede, *arguendo*, as contended by the appellees and disputed by appellant, that the United States may exercise over the park not only rights of a proprietor, but the powers of a sovereign. There are limitations, however, upon both. *Neither can be exercised to destroy essential uses of private property.* The right of appellant to pasture his cattle upon his land, and the right of access to it, are of the very essence of his proprietorship. . . . His (Benson’s) order is not, it will be observed, a regulation of the use of the land, as an order to fence the lands might be, but is an absolute prohibition of use. It is not a prevention of a misuse or illegal use, but the prevention of a legal and essential use—an attribute of its ownership—*one which goes to make up its essence and value. To take it away is practically to take his property away.*” 56 L. ed., pp. 105-106.

“Where the Government occupies land by the overflow of water with no claim of title or right, it is the exercise of the right of eminent domain, from which an implied contract arises.

“In the civil economy of political society *whatever is legal is right*; the power of eminent domain is legal, and is therefore right; being right in legal contemplation it excludes from the transaction to which it is properly applied all wrong, and therefore all tort.

“The taking of private property without the consent of the owner on the part of an individual is a wrong *per se*; but not necessarily so upon the part of the Government, as it has the constitutional right to take private property against the will of the owner, *subject to the condition of paying for it.* Individuals hold their property subject to the wants and necessities of the public, and if in the exercise

of the right of eminent domain the public appropriate such property, a *compensation* in value is the only redress due the owner." . . .

*"The owner may waive any objection he might be entitled to make based upon the want of such formal proceedings (formal condemnation), and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain may demand just compensation for the property."*

*Merriam v. United States*, 29 Ct. Cls. 250, 258-259.

Where a county road was overflowed from backwater caused by a Government built dam, the court held the United States liable for the taking of "*private property* within the meaning of the Fifth Amendment to the Constitution," saying:

*"The fee of the road taken is assumed to have been in the abutting property owner in accordance with the general rule in the State of Kentucky. The county's property was an easement which it held in trust for the benefit of the public."*

*"While such property is within most of the definitions of public and not private property, we are of the opinion that for purposes of compensation as for a taking under the Constitution it is properly to be regarded as private property and upon that theory we have awarded judgment."*

*Wayne County, Kentucky v. The United States*, 53 Ct. Cls. 417; affirmed 252 U. S. 574, 40 S. Ct. 394, 64 L. ed. 723.

*"Where land is appropriated to a public use, either with the consent of the owner or otherwise, a common law action will lie to recover the just compensation to which the owner is entitled. These cases proceed upon the*



ground of an *implied promise* to pay the just compensation to which the owner is entitled; \* \* \*. The *measure of damages would be the same as in a condemnation proceeding.*"

*Lewis, Eminent Domain*, (3rd ed.) Sec. 889, p. 1545; and numerous cases there cited.

"It may be laid down as a well-settled principle that every proprietor over or past whose land a stream of water flows has a right that it shall continue to flow to and from his premises in the *quantity, quality and manner in which it is accustomed to flow by nature*, subject to the right of the upper proprietors to make a reasonable use of the stream as it flows past their land. This right is a part of his *property* in the land and in many cases constitutes its most valuable element. It necessarily follows therefore, that *any violation of this right in the exercise of the power of eminent domain, is a taking of private property for which compensation must be made.*"

*Lewis, Eminent Domain*, (3rd ed.) Sec. 71, p. 69; and numerous cases there cited.

"Where the waters of a stream or any part thereof are taken or *diverted* \* \* \* *to make a new channel* either for the improvement of navigation or for the protection of a public road, or *for any other public use*, compensation must be made to the inferior proprietors on the stream who are injured thereby."

*Lewis, Eminent Domain*, (3rd ed.) Sec. 74, pp. 73-76; and cases there cited.

"Not only is it a violation of the right of a riparian owner to obstruct or divert the water of a stream before it reaches his land, but it is *equally a violation of his*

*rights to increase the quantity of water flowing past his land by artificial means not connected with the reasonable use of the land above."*

*Lewis, Eminent Domain, (3rd ed.) Sec. 75, p. 78.*

*"Works of public utility must be so constructed as not to interfere with the accustomed flow of the stream, otherwise there is a right to recover for a consequent damage to private property."*

*Lewis, Eminent Domain, (3rd ed.) Sec. 78, p. 86; and cases cited.*

*"If no part of one's land is taken, he may always recover for damages occasioned by such interference with current of the stream, \* \* \* by a common law action. \* \* \**

*"Changing the channel or direction of the current, so that the stream is cast upon the lower proprietor in a different place, or so that the current strikes his land from a different direction, to his injury, is a taking or actionable injury."*

*Lewis, Eminent Domain, (3rd ed.) Sec. 78, pp. 87-88; and cases cited.*

*"The public right is a right of passage only, including the right to improve the navigation. It is necessarily limited to the bed of the stream. So far as the water is concerned, it can only use it for navigation; it cannot take it or divert it."*

*Lewis, Eminent Domain, (3rd ed.) Sec. 85, p. 100; and cases cited.*

*"\* \* \* any damage to riparian owners on public streams by works for any purpose not connected with the*

improvement of navigation is *a taking for which compensation* is to be made."

*Lewis, Eminent Domain*, (3rd ed.) Sec. 88, p. 107; and cases cited.

"Generally, it is *a taking* to collect surface water into a channel and turn it in a body upon the land of another, *whether the water would have found its way there by nature or not.*"

*Lewis, Eminent Domain*, (3rd ed.) Sec. 112, p. 154; and long list of cases there cited.

"*Flooding Land or Interfering With Drainage.* Where land is flooded, or *its drainage prevented*, by the obstruction of the flow of water, or *its diversion from its natural channel*, there is, in general, such *a taking* or injury as entitles the owner to compensation, although the improvement causing the injury was authorized by the legislature."

*20 Corpus Juris*, p. 684, Sec. 147; and numerous cases there cited.

"Property need not be taken in the literal sense in order to entitle the owner to compensation as for property taken, and, *in fact the right acquired is ordinarily a mere easement.* The owner has the same amount of land as before, but the *easement acquired* for the public use is a material and permanent interruption in the use of the land which is the taking of property. Property in land is right of user and disposition and dominion *to the exclusion of all others*, and that is the sense in which it is used in the Constitution."

"In some cases, such as railroad right-of-way, the *right acquired* by the petitioner is practically exclusive,

and the naked title which is left in the owner is for all practical purposes of no value. In such cases the damages must be assessed at the *full market value* of the land. *In any case* the owner is entitled to be paid for such rights of use and enjoyment of his land as are taken from him . . . .”

*Drainage Commissioners v. Knox*, 237 Ill. 148, 86 N. E. 636, 637.

“It (property) comprehends not only the thing possessed but the right also to use and enjoy it and every part of it, and in case of real estate to the full limits of the boundary thereof. \* \* \* Upon principle, therefore, as well as upon authority, we hold that *any thing done by a State or its delegated agent, as a municipality, which substantially interferes with the beneficial use and ownership of the land, depriving the owner of his lawful dominion over it or any part of it, not within general police powers of the State as commonly understood, is a taking or damaging of the property without compensation within the meaning of the constitution and inhibited thereby.*”

*Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S. E. 105, 106, L. R. A. 1915C 981.

“Property is defined to be the *unrestricted and exclusive* right to a thing; the right to dispose of the substance of a thing in every legal way; to use and exclude everyone also from interfering with it. Burrows Law Dictionary. To hold that one man may lawfully for his own pleasure or convenience *make use of or in any way interfere with the property of another* without his permission, would be to introduce into the law of property a doctrine both novel and dangerous.”

*Bruch v. Carter*, 32 N. J. L. 554, 561. \* 7

*"Anything which destroys any of the elements of property, including the owner's unrestricted and unlimited right of use, enjoyment and disposal, to that extent destroys the property itself."*

*Fitzhugh v. City of Jackson*, 132 Miss. 585, 97 So. 190,  
33 A. L. R. 279.

*"Property is taken within the constitutional meaning where it is materially impaired by something more than mere consequential injury, and which impairment renders it impossible for the owner to enjoy his property to the full extent to which he is entitled."*

*Lovett v. West Virginia Central Gas Co.*, 65 W. Va. 739, 65 S. E. 196, 24 L. R. A. (N. S.) 230.

*"When and so far as the owner of land is prevented from exercising practical dominion and the right to use his land at his own free will and pleasure, it is taken."*

*Traut v. White*, 46 N. J. E. 437, 19 Atl. 196.

*"A taking or deprivation of property which is prohibited by the constitution unless due compensation is made includes anything that affects or limits the free use and enjoyment of one's property or of the easements or appurtenances thereto."*

*Myer v. Adam*, 71 N. Y. S. 707, 710.

In the *Wateree Power Co. v. Rion* (S. C.), 102 S. E. 331, the court held: *"A claim of right to use land by way of an easement is as much a taking as if the land were constantly subjected to the easement;"*  
or in the exact language of the opinion:

*"The right to use the land condemned at any time by the respondent is in contemplation of law just as much a*



taking for the purpose of easement as if actually used *all the time* by them." *Wateree Power Co. v. Rion*, (S. C.), 102 S. E. 331.

In *Mississippi & R. R. Boom Co. v. Patteson*, 98 U. S. 403, 25 L. ed. 206, 208, the court in speaking of the various ways in which property may be taken for public use said: "The property may be appropriated by an *Act of the Legislature*. . . ."

"As the plaintiff in the case at bar was virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value and interfered with his power of disposition, it was to that extent void as to him, . . ."

"Whenever a law deprives the owner of the beneficial use and free enjoyment of his property or *imposes restraints upon such use and enjoyment that materially affects its value*, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution that it must in terms or in effect authorize an *actual physical taking* of the property or the thing itself, so long as it *affects its free use and enjoyment or the power of disposition at the will of the owner*."

*Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A.

In *St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226, an ordinance of the city of St. Louis established a certain highway as a Boulevard and forbade the erection of any building within forty feet of the North and South line of the Boulevard. Defendant, who owned land abutting upon the North side of the Boulevard was convicted of violating the ordinance by building a structure within fifteen feet of the North line of the Boulevard. It was contended that the ordinance was void, because it took his property without making compensation. The court said:

"It is urged on behalf of plaintiff that there has been no 'taking' of private property under this law and ordinance, because the 'title' to the property and the right to use the same, are still in the defendant. This contention brings into prominence the true import of the word 'property.' The general result of various definitions of the term is that it is the *exclusive* right of any person to freely use, enjoy and dispose of any determinate object, whether real or personal. (Citing cases.) Sometimes the term is applied to the thing itself, as to a horse or a tract of land. These things, however, though the subjects of property, are, when coupled with possession, but the indicia, the visible manifestations, of invisible rights, 'the evidence of things not seen.' *Property*, then, in a determinate object, is composed of certain constituent elements, to-wit, the *unrestricted* right of use, enjoyment and disposal of that object. It follows from this premise that *anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction pro tanto of property*, though the possession and power of disposal of the land remain undisturbed, and though there be no ac-

*tual or physical invasion of the locus in quo.* (Citing cases.)

"The use of a given object is the most essential and beneficial quality or attribute of property. Without it all other elements which go to make up property would be of no effect. If the city were allowed to deprive the defendant of the use of his entire lot, it would leave in his hands but a barren and Barmecidal title; and what is true of property rights as an integer is true of each fractional portion. If plaintiff's theory be correct, then the city could pass and enforce an ordinance which would deprive defendant of the use of his entire lot, and still there would be no 'taking' within the terms of Section 21, Art. 2 of the Constitution, and consequently no right to compensation. The statement of such a position is sufficient to accomplish its utter repudiation.

*"The day before the ordinance went into operation defendant had the unquestionable right to build at will on his lot. The day afterwards he was as effectually prevented from building on the forty-foot strip, except under peril of punishment, as if the city had built a wall around it, and this too, without any form of notice, any species of judicial inquiry, or any tender of compensation. If this is not a 'taking' by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city."*

Just as effectively does the Flood Control Act make it impracticable to build a costly home or make any valuable permanent improvements on lands forming the floor of the Boeuf Basin floodway. It has rendered such lands unfit as a place to live or farm.

In *Philadelphia Company v. Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. ed. 570, the controversy was over the establishment by defendant, Secretary of War, under authority of Congress, of certain harbor lines in the Ohio River claimed to encroach upon an island therein, owned by plaintiff, and to prevent it from occupying its land outside of the prescribed limits. In drawing a distinction between the effect of merely establishing such harbor lines and enforcing them to the injury of private rights, the court said:

"It has been held that the establishment of a general system of harbor lines for the protection of commerce and navigation is not of itself an injury to property and cannot be restrained. (Citing cases.) But it has also been recognized that a different question arises when *active measures are taken against an individual proprietor to maintain a location of limits in alleged violation of his private rights and thus to prevent him from enjoying what is asserted to be the lawful use of his property.* (Case cited.)"

In *Richards v. Washington Terminal Company*, 233 U. S. 546, 34 S. Ct. 654, 58 L. ed. 1088, Congress, by two certain Acts, authorized defendant to construct a tunnel with ventilating fans at the mouth thereof in the vicinity of plaintiff's dwelling house, for the passage of railroad trains through the same. The operation of the fans, as well as the trains themselves passing through the tunnel, caused huge quantities of smoke and gas to enter plaintiff's house, settle on the furniture, contaminating the air and otherwise rendering the dwelling objectionable as a place of habitation. The Act authorized defendant to acquire by condemnation "the lands and property necessary for all

and every purpose contemplated," but the defendant never resorted to condemnation proceedings for the ascertainment of the damage done to the plaintiff. Plaintiff brought suit to recover his damages. Recovery was allowed. The court said:

"The case shows that *Congress* has *authorized*, and in effect *commanded*, defendant to construct its tunnel with a portal located in the midst of an inhabited portion of the city. The authority, no doubt, includes the use of steam locomotive engines in the tunnel, *with the inevitable concomitants* of foul gases and smoke emitted from the engines. No question is made but that *it includes the installation and operation of a fanning system* for ridding the tunnel of this source of discomfort to those operating the trains and traveling upon them. All this being granted, the special and peculiar damage to the plaintiff as a property owner in close proximity to the portal is the *necessary consequence*, unless at least it be feasible to install ventilating shafts or other devices for preventing the outpouring of gases and smoke from the entire length of the tunnel at a single point upon the surface, as at present. Construing the acts of Congress in the light of the Fifth Amendment, *they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him*. If the damage is not preventable by the employment at reasonable expense of devices such as have been suggested, then plaintiff's property is 'necessary for the purposes contemplated,' and may be acquired by purchase or condemnation \* \* \*, and pending its acquisition defendant is responsible. If the damage is readily preventable, the statute fur-



nishes no excuse, and defendant's responsibility follows on general principles."

Paraphrased to adapt the same principle to the facts in the case at bar, is it not obvious that the court would be required to say:

"The case shows that Congress has authorized and in effect commanded defendant to construct a floodway over these lands with the inevitable concomitants (as expressly alleged in the petition) of overwhelming them with the floodwaters of the river, sweeping away all improvements thereon, covering them with sand, stone and debris, choking up the drainage ditches thereon, killing the timber, making impossible the logging thereof, rendering the soil unfit for further profitable use, and completely destroying the market value of the land from the time it became certain that they were to be used for floodway purposes. All this being granted, this special and peculiar damage to respondent, as the owner of lands within the floodway, is the necessary consequence. Construing the Act of Congress in the light of the Fifth Amendment it does not authorize the imposition of so direct and peculiar and substantial burden upon respondent's property without compensation to her. If this damage is not preventable, then respondent's property is necessary for the purposes contemplated and may be acquired by purchase or condemnation, and pending its acquisition petitioner is responsible."

In *In re Delafield*, 109 Fed. 577, the City of Pittsburgh passed an ordinance for the condemnation and taking of petitioner's property for a filtration plant. Under the law either party could institute a condemnation proceeding.

The landowner instituted such a proceeding. The court said:

"The ordinance here declares and enacts that 'the said city does hereby elect and resolve to take, use, and appropriate the said real estate and land for the purposes aforesaid.' \* \* \* *To all intents and purposes, the ordinance amounts to an actual appropriation. It deprives the proprietor of his beneficial ownership.*"

In *Chappel v. United States*, 34 Fed. 673, the United States Light House Board, by authority of Congress and with money appropriated by Congress for that purpose, erected two light houses or range lights; one in the water in front of the shore of plaintiff's lands and the other a mile back on the land of someone else. Plaintiff's land lay between the two lights and was being held by him as a site for buildings for manufacturing purposes. In order that the lights might perform their purpose, it was essential that there should be no intervening objects between the two lights; so that vessels navigating the channel could for their guidance observe the two lights in a line with one another. The proper authorities of the government commanded plaintiff to leave a space on his land not less than sixty feet wide unobstructed by buildings. He sued for compensation because he had thereby been prevented from using that portion of his land. In overruling defendant's demurrer to the petition, the court said:

"It is not denied that the obstruction which would have resulted from the plaintiff building upon his land between the beacons would have defeated the lawful purpose of the United States, and would have endangered the safety of vessels using the channel which Congress had

directed should be deepened, and should be marked by the range beacon. These being the facts it would seem clear in requiring that the beacons should remain unobstructed and *in requiring that plaintiff should desist from building on his intervening land*, the officers of the Light House Board were doing *a lawful and authorized act* and one necessarily involved in the direction by Congress that the Board should erect and maintain the range beacons. It cannot be said, therefore, that their act was tortious. And we think it follows, that *if the plaintiff, by submitting to their lawful commands, consented to a restriction upon the free use of his property, which entailed damage or loss upon him, there is no obstacle in the jurisdiction of the court to his recovery*. In the case of *United States v. Manufacturing Company*, 112 U. S. 645, the Supreme Court distinctly held that where, pursuant to an act of Congress, private property had been taken for public use, by the officers of the Government, there is an implied obligation upon the Government to make compensation to the owner, and, although the taking be irregular and might have been enjoined, that *the claimant could waive his right to resist the officers of the Government and electing to regard their action as lawful, might sue in the Court of Claims for just compensation.*"

In *School Corporation v. Heiney*, 178 Ind. 1, 98 N. E. 628, 43 L. R. A. (N. S.) 1023, there had been deeded to the School Corporation for school purposes a certain tract of land, the deed providing that the property shall be forfeited if the use thereof for school purposes should be discontinued. This property was located 470 feet from a certain railroad right-of-way. Subsequently, the Legislature

passed a law making it unlawful to erect school buildings at any place within 500 feet of a railroad. By reason of its bad state of repair the school building on this site had been condemned by the State Board of Health, and it had become necessary to construct a new building in place thereof. The School Corporation employed an architect to prepare plans and specifications for the new school building and intended to erect the same on the old site. Plaintiff brought suit to restrain the corporation from so doing. The School Corporation contended that the Act was unconstitutional as a taking of property without due process of law and in violation of the Federal and State Constitution. The court in upholding this contention said:

"What is a 'taking' of property within the constitutional provision is not always clear; but, so far as general rules are permissible of declaration on the subject, it may be said that there is a taking where the act involves *an actual interference with, or disturbance of, property rights*, which are not merely consequential or incidental injuries to property or property rights, as distinguished from *prohibition of use or enjoyment, or destruction of interests in property*. (Citing cases.) *It seems axiomatic in that, if property may not be physically taken without just compensation under due process of law, one cannot be deprived of its use or enjoyment, for that is in effect a taking.*"

In *Glover v. Powell*, 10 N. J. E. 211, the plaintiffs, for a great number of years, had maintained under legislative authority a dam upon a creek emptying into the Delaware River for the purpose of protecting their meadow lands along the creek. Subsequently, in 1854 the Legislature ordered the dam removed and the creek opened as a public.

highway. The defendants, as the Township Committee, were directed to remove the dam by a designated day. Plaintiff brought suit to enjoin their doing so. In the course of its opinion the court said:

"The Act of 1854 is also repugnant to the Constitution of the State of New Jersey. Art. 1, No. 16, declares private property shall not be taken for public use without just compensation. And Art. 4, No. 7, par. 9, individuals or private corporations shall not be authorized to take private property for public use, without just compensation first made to the owners. The dam and water works in question are private property. They have been constructed, maintained and paid for by the owners of the meadow along the creek. They have been acquired under the express sanction of law. *The value of the meadow is destroyed by the execution of the law in question, and thus may be said, with propriety, to be taken from the owners. A partial destruction, a diminution of their value, is the taking of private property.* This act cannot be carried into effect without a violation of the Constitution of the State."

"The constitutional guaranty that no person shall be deprived of his property without the due process of law, *may be violated without the physical taking of property* for public or private use. Property may be destroyed or its value may be annihilated; it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence *any law which destroys it or its value, or takes away any of its essential attributes deprives the owner of his property.*"

*In re: Jacobs*, 98 N. Y. 98.



"The word 'property' in the tenth article of the Bill of Rights, which provides that 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor,' should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such.

"Nor is it material whether the property is removed from the possession of the owner, or in any respect changes hands; if it is of such a character and so situated that the exercise of the public use of it, as warranted by the Legislature, does in its necessary natural consequences, affect the property, by taking it from the owner, or depriving him of the possession or some beneficial enjoyment of it, then it is 'appropriated' to public use by competent authority, and the owner is entitled to compensation."

*Old Colony Etc. R. Co. v. County of Plymouth*, 14 Gray 155.

"The proprietary rights which are the only valuable attributes or ingredients of a landowner's property, may be taken from him without an asportation or adverse personal occupation of that portion of the earth, which is his in the limited sense of being the subject of certain legally recognized proprietary rights, which he may exercise for a short time. Property is taken when any of those proprietary rights is taken, of which property consists."

*Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 545.

"Any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed is a taking, even

though the title and possession of the owner remain undisturbed, *and there is no actual, physical invasion of the property.*

"The authorities do not all agree as to just what will amount to a taking of private property, within the meaning of the provision of the Constitution of the United States, which provision, with an occasional change in the phraseology, has been incorporated into the Constitutions of the several States, namely, 'Private property shall not be taken for public use without just compensation.' Many of the *earlier cases* adopted the more restricted construction, and held that, to bring a case within the foregoing provision of the Constitution, there must be *'an actual physical appropriation of the private property sought to be converted to a public use; but, as stated in I Lewis on Eminent Domain (2d Ed.) par. 57, 'the law, as to what constitutes a taking has been undergoing radical changes in the last few years.'* And the great weight of the more judicial authority, which we believe to be supported by the better reason, and which is more in accord with our ideas of equity and natural justice, holds that *any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a taking, in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed.'*" (Citing cases.)

*Stockdale v. Rio Grande W. R. Co.*, 28 Utah 201, 77 Pac. 849, 852.

In *People ex rel. M. Wineburgh Advertising Co. v. Murphy*, 113 N. Y. S. 855, the question was whether an or-

dinance restricting the height of sky signs for advertising purposes to 9 feet, could be sustained as a reasonable exercise of the police power: The realtor had sought and had been denied a permit to erect a sign upon his building in excess of 9 feet. The court said:

"It is complained that this (ordinance) imposes such limitations upon the use of real property within the City of New York as to amount to the taking of private property without compensation. *It is quite clear that the ordinance constitutes a taking of the property. It imposes restraints and limitations upon the owner's power to use his property* and it is well settled that when a law deprives the owner of the beneficial use and free enjoyment of his property or imposes restraints upon such use and enjoyment that *materially affects its value*, it deprives him of his property within the meaning of the Constitution."

"Private property may not be taken for a public use without the making of just compensation to the owner. *The taking of property under that provision of the Constitution does not always mean the actual taking by the process of obtaining the physical possession of the property.* When the use of property is interfered with to the prejudice of the owner and there is *a diminution of the value* of the use of the property, *that is a taking* within the meaning of the Constitution."

*Webster County v. Lutz*, 234 Ky. 618, 28 S. W. (2d)

966.

Any number of additional, supporting authorities could be cited; but the foregoing should suffice to portray the principles sustained by the overwhelming weight of authority in the judicial world, principles which, as they are

read, this court will instinctively apply to the facts in the present case as reflected by the allegations of respondent's petition and this record.

When the petition in the case at bar (R/ 4-16) is read in the light of the foregoing authorities, the petitioner must expect an adjudication of "taking" in the constitutional sense, as the Congress intended. . The material allegations of the petition are indubitably established by official records and uncontradicted testimony. The admitted facts impel the judicial mind to the irresistible conclusion of petitioner's liability. There is no logical escape. Every requirement of natural justice, common sense and judicial reasoning conspires to render judgment here for respondent.

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## APPENDIX E.

**WHEN was the property "taken"?**

In *United States v. Yazoo & M. Ry. Co.*, 4 Fed. Supp. 366, a case parallel and in all respects in point with the present case, being a construction of the Flood Control Act of May 15, 1928, with reference to the Bonnet Carre floodway, the court correctly said:

"For all practical purposes the spillway is, and has been since June, 1931, complete and ready for operation whenever the need therefor shall arise. *The United States has acquired and taken every right needed for the spillway project, and the property of the respondent has to all intents and purposes been subjected to every possible use contemplated by the taking.*

"The facts show a taking within the principles of law applicable and give rise to compensation in favor of the respondent." 4 Fed. Supp. 366.

"Where a statute provides that certain lands described therein or so much thereof as the commissioners deem advisable, are hereby declared to be a public park, the actual appropriation occurs when the commissioners make their decision.

"There can be no doubt that the actual appropriation of the property by the city occurred when the commissioners decided that all the land described in the act should be acquired and the value of the land appropriated should be estimated as of that date."

*In re: Mayor*, 58 N. Y. S. 58.

"Where a city gives to a railroad company a right to elevate its tracts by building a wall on a street, the



property of an abutting owner is deemed taken or injured whenever the work of the railroad company has progressed to such an extent as to make the construction of the wall reasonably certain for the owner could then only sell his property for less than he could have got for it before it was generally known that the wall would be constructed, and after the construction has commenced every prospective purchaser would have the right to assume and would assume that it will be completed."

*Louisville & N. R. Co. v. Lambert*, 33 Ky. L. R. 199, 110 S. W. 305.

In *Ft. Wayne & S. W. T. Co. v. Fort Wayne & W. R. Co.*, 83 N. E. 665, 16 L. R. A. (N. S.) 537, the act governing condemnation of right-of-way by railroad companies provided that "the corporation shall forthwith deposit with the clerk of the circuit court or other court of record wherein the land lies, the description of the rights and interests intended to be appropriated and such lands, rights and interests shall belong to such company to use for the purpose specified by making or tendering payment as hereinafter provided." The court held that under this statute the filing of such instrument specifically *describing the property seized and declaring the intention of appropriating it*, (as is done by the Flood Control Act of May 15, 1928), is the formal assertion of the absolute right to appropriate it, and nothing remains to be done but to compensate the owner; that *the act of filing this instrument constitutes the taking and the right of the landowner to damages is then complete*; that by the filing of the instrument of appropriation the right to take the land becomes fixed but does not become complete nor carry the right of possession until the damage has been paid or tendered;

that all damage flowing from the construction and proper operation of a railroad, both present and prospective, is ascertainable and assessable as of the time or date of the seizure or taking of the property, which is the filing of this instrument of appropriation.

*In Hampden, etc., Co. v. Springfield, etc., R. Co.*, 124 Mass. 118, the plaintiff brought proceedings to have its damages ascertained for the taking of its land by the construction of defendant's railroad. The question was as to the time when the taking had occurred. The court, after stating that the statute authorized railroads to lay out their road five rods wide and required them to file the location of their road with the County Commissioner, held that the railroad gained its rights and the plaintiff sustained its damage by *the filing of the location*; that *this filing constituted a taking* of the land and that the damages were to be assessed as of the filing of the location, and not as of the date when the land was entered upon and the construction of the road commenced.

*In In re: Department of Public Parks*, 6 N. Y. S. 750, the Legislature on June 14, 1884, authorized the city of New York to acquire title for the use of the public to the whole or any part of lands therein described by metes and bounds. The act provided that when the Board of Street Opening and Improvement shall have decided it to be for the public interest to acquire title to the lands so described in the act, it shall make application to the Supreme Court for the appointment of commissioners to assess the damages specifying lands required for the improvement. Subsequently, commissioners were appointed. They made their report in 1888 but valued the land as of June 14, 1884, the

date of the passage of the act. The court held that the appraisement was properly made as of this date because the act described by metes and bounds the lands taken and *the legislative intent was that they should be taken immediately*, the work of the commissioners being merely to ascertain the price to be paid so that the city could acquire title.

In *People ex rel. Canavan v. Collis, Commissioner of Public Works*, 46 N. Y. S. 727, the Legislature in 1894 declared certain lands to be a public park and required the city of New York to condemn them and have them appraised. The act described the lands by metes and bounds. The court said:

"The statute provided a complete scheme for the condemnation of the property and the payment of the price which should be awarded to the owners, and it operated to condemn the land and appropriate it for public use. In re: Mayor, etc., 99 N. Y. 569, 580, 2 N. E. 642; In re: Public Parks, 53 Hun. 280, 6 N. Y. Supp. 750. From the time of the passage of the act and *certainly from the time when the lands therein were located by the filing of the map*, they were fully appropriated and set apart for public use, and the duty of taking proceedings to appraise their value arose; and, as was held in the cases last cited, the value was to be appraised as of the time *when the land was taken by the passage of the act*. The law gave to the municipal authorities of the city of New York *no locus poenitentiae*, or right to discontinue the proceedings; but the statute made it obligatory upon them, not only to take the proceedings for condemnation, but to pursue those proceedings to a final report. The case is not one where it lay in the discretion of the commissioner of public

works or the department of public works whether or not to take lands, or whether or not to continue proceedings which had once been begun for the condemnation of land; but *the taking of this land was the act of the Legislature*, and the absolute duty of having it appraised was imposed upon the city, without any right or power to discontinue it. *The rights of the parties, so far as the taking of the land is concerned, were fixed by the statute.*"

In *Chelton Trust Co. v. Blankenburg*, (Pa.) 88 Atl. 664, the Legislature directed the common council of the city of Philadelphia to obtain by dedication or purchase an adequate number of squares to be opened as public places for the health and enjoyment of the people, and it was provided that whenever the council selected a square or area for that purpose, if they could not agree with the owner as to the price to be paid, they were authorized to institute proceedings for assessing the damages to be paid. Under this act the city passed an ordinance selecting for park purposes certain lands of the plaintiff, and declaring that the tract had been selected and appropriated for that purpose. In construing the effect of this ordinance the court said:

"Appellee's land was practically taken and appropriated by the city of Philadelphia *the day the ordinance selecting it for park purposes was approved and such appropriation of it to public use will continue as long as the ordinance is unrepealed*. When the land shall be actually taken and turned into a park, the date of taking will relate back to the date of the ordinance. (Citing cases.) Though the appellee may remain in possession of the land until the damages for its taking have been paid or secured, such occupation can be but permissive, at all times subject to the

paramount rights of the public. The land cannot be built upon or improved, except at the hazard of the improver, and it is *worthless for sale*. \* \* \* This being the situation, appellee's absolute right is to have paid or secured to it the damages which are now due it."

In *In re: Philadelphia Parkway*, (Pa.) 95 Atl. 429, the city council passed an ordinance for the establishment of a parkway upon the city plan. Thereafter the Department of Public Works directed the plotting of the parkway upon the confirmed plan, which was done. Thereupon, the city by condemnation or purchase, from time to time acquired title to various properties within the lines of the confirmed plan and up to the time of the action had expended upwards of five million dollars on the project, and was *committed to the improvement*, though *intended to complete it at its own convenience*. Plaintiff owned a lot, which was entirely within the lines of the proposed parkway, on which he had erected a dwelling house. The city asserted the right to proceed with the work from time to time in the aforesaid manner, without having to make compensation until the council passed an ordinance opening the boulevard, irrespective of any injury that may have been sustained by a property owner. The city's theory was that such ordinance for the opening of the boulevard was necessary in order to constitute a taking of the property for public use. The court conceded such to be the general rule established by the cases, but took the view that the case then before it presented a situation not contemplated, either by the rule or reason of the decided cases.

"This great boulevard is not intended for the ordinary purpose of commercial travel. Its purpose is to add charm and beauty to the city and to give pleasure to its



population. It is a defined public way within specified and limited boundaries. It cannot serve the purpose for which it was intended until completed. A completion in part would serve no useful public purpose, and moneys expended on the unfinished undertaking would be deemed wasted. The parkway must therefore be regarded as *one entire public improvement* and it is important to keep this thought in mind in discussing the principles of law here involved. What then is the legal status of appellant in the present case? \* \* \* The constitutional mandate is that there shall be 'just compensation for property taken, injured or destroyed,' and that the property of appellant was injured by what the city has done is averred in the petition and not denied by any one. It must therefore be accepted as an established fact for the purposes of this case. The petition sets out in detail numerous ways in which appellant has been injured, and we have no doubt that the averments are true in fact. We do not understand that the city disputes the facts, but *it stands upon the ground that the time has not yet arrived to assess the damages*, and this because no formal ordinance to open has yet been passed by councils. More than ten years have passed since the beginning of the undertaking without an ordinance to open. During this period lands have been condemned for parkway purposes in some instances, properties purchased in others, improvements have been made and work done on parts of the boulevard, and \$5,000,000 (*one-third of the estimated cost of the entire improvement*) have been expended."

After reviewing certain cases the court continued:

"The plain inference from this language is that, *if the city did some unequivocal act evidencing an intention to*

open, followed by actual work done on the projected street, the right to compensation under proper circumstances might accrue even if councils have failed or neglected to pass an opening ordinance. In the very nature of things such cases would be exceptional; and we only mention the excerpts above quoted to show that the principle has been recognized as applicable when the facts warrant its application. The present case belongs to this exceptional class. Here we have not one but a series of unequivocal acts covering a period of years and all evidencing the intention of the city to open and complete the parkway. In furtherance of the intention to open and complete the undertaking lands have been condemned under the power of eminent domain, properties purchased, improvements made, and large sums of money expended. The city is just as irrevocably committed to the improvement as if the ordinance to open had been passed. The termini of the boulevard are definitely fixed by city hall at one end and Fairmount Park at the other. The courses and distances are marked on the ground and at some points the parkway is open to public use. Buildings have been torn down at each end and a large amount of work done looking to final completion. As hereinbefore stated, the parkway must be regarded as one entire improvement, it is either this or nothing. The city has committed itself to this improvement by its acts just as much as if councils had declared their intention by passing an ordinance to open. The law looks to the substance and not to the form. It is futile to argue that councils have not committed the city to the opening when they have already appropriated millions of dollars for this purpose. We consider what has been done as the equivalent of notice to the property owners that their lands would be appropri-

ated for parkway purposes and that their possession was  
about to be disturbed." 95 Atl. 429.

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## APPENDIX F.

**The official History of CUT-OFFS in the Mississippi River.**

(The following historical facts are taken from "Mississippi River Flood Control and Navigation" issued by the War Department, U. S. Corps of Engineers, United States Waterways Experiment Station, Vicksburg, Mississippi, May 1, 1932, in 3 volumes, which will be hereinafter referred to as "M. R. F. C. & N.")

*First artificial cut-offs.* In the year 1831 a bold attempt was made to improve navigation conditions at the mouth of Red River by an artificial cut-off proposed by Captain Shreve. This cut-off was followed by a second artificial cut-off made at Raccourci Bend several miles below by the State of Louisiana in 1848. Subsequent history has shown that as navigation improvements *they were a failure.* (M. R. F. C. & N., p. 7.)

During the period 1765-1929 the aggregate shortening of the lower river by cut-offs amounted to 228 miles. The 20 recorded cut-offs shown in Table IX (p. 59) have shortened the river channel by an average of 12.5 miles per cut-off. *However, the length of the lower river in 1929 did not differ greatly from the length in 1765.* Compensatory lengthening has taken place to offset the temporary channel shortening resulting from cut-offs. (M. R. F. C. & N., p. 61; and R. 280.)

The sole effect upon discharge is a slight reduction in channel storage due to depression of stage within the upstream limit of cut-off influence. In the normal case this has no perceptible effect upon the discharges below the cut-

off. Channel characteristics below the cut-off are *not permanently changed* (M. R. F. C. & N., p. 61).

Ellet's Report of 1852 is contained in Com. Doc. No. 5, 70th Congress, 1st Session. This report made pursuant to an Act of Congress states "that the *floods* in the Alluvial Valley of the Mississippi River *would increase in frequency and extent* with the increase in cultivation in the valley and the extension of the levee system. His proposals for the control of Mississippi floods included *the prevention of cut-offs.*" (M. R. F. C. & N., p. 9.)

Ellet regarded cut-offs as "*an unqualified evil*" on the lower Mississippi River. (M. R. F. C. & N., p. 300.)

The Delta Survey submitted in 1861 discusses river hydraulics and the effects of cut-offs. The report concluded that plans for channel improvement by cut-offs were *too dangerous* and costly to be adopted. (M. R. F. C. & N., p. 10.) "Both Ellet, and Humphreys and Abbot agreed that cut-offs were *dangerous to the regimen of the river.*" (M. R. F. C. & N., pp. 60-61.)

The federal "Levee Commission" reported in 1874 "that cut-offs were *pernicious* in their effects." (M. R. F. C. & N., p. 12.)

On May 16, 1913, the President of the Mississippi River Commission reported to the President of the United States that cut-offs were *neither efficacious nor practicable* for flood control or the prevention of floods on the Mississippi River (M. R. F. C. & N., p. 18).

*Definition, and Description of formation.* The phenomenon known as a cut-off is characteristic of alluvial rivers, and the Lower Mississippi is no exception to this hydraulic



rule. The manner in which a cut-off occurs is easy to understand. The lower river channel is a series of reverse curves or bends which tend to lengthen themselves. Under conditions favorable to this process, these bends ultimately become great loops whose necks are very narrow. The length of a typical bend may vary from 8 to 15 miles. On the other hand, the shortest distance across the neck may not exceed three-quarters of a mile. Unless the banks of the neck are protected, active and continuous caving takes place. In the natural state of the river, this continued bank caving narrowed the neck until a "break-through" occurred and a chute channel was formed across the neck. This chute had the same total fall as the old channel around the bend. *Current velocities through the chute were consequently relatively very great*, and the chute enlarged until it ultimately accommodated the entire discharge of the river. The old channel thereupon silted up its ends and formed an ox-bow lake. The term "cut-off" is applied by common usage to the shortened chute channel across the old bend. (M. R. F. C. & N., p. 58.)

"Moreover, the policy of the Mississippi River Commission between 1884 and 1928 contemplated *the prevention of cut-offs*, and none were allowed to occur during that period. (M. R. F. C. & N., p. 60; R. 247.)

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*Finis.*